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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 138.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,
PLAINTIFF IN ERROR,

vs.

OLIVER P. CUMMINGS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

**FILED NOVEMBER 6, 1879.**

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1 *Copy of judgment.*

UNITED STATES OF AMERICA,
*Maine District, ss:*

At a term of the circuit court of the United States for the first circuit, begun and holden at Portland, within and for the district of Maine, on Tuesday, the twenty-third day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

Present, the honorable John Lowell, circuit judge.

OLIVER P. CUMMINGS, OF PARIS, IN THE county of Oxford and State of Maine, plaintiff,

*v.*

THE GRAND TRUNK RAILWAY COMPANY OF Canada, a foreign and alien corporation created and existing by the Queen of the United Kingdom of Great Britain and Ireland, by and with the advice and consent of the legislative council and of the legislative assembly of the province of Canada, said corporation and the stockholders thereof being foreign citizens and subjects, and citizens of said kingdom and of the Dominion of Canada, and subjects of said Queen,
2 said corporation having its principal place of business at Montreal, in said dominion, and also having an established place of business and doing business at Portland, in the county of Cumberland and State of Maine. } No. 17.

In a plea of the case, for that on the sixth day of March, A. D. 1875, and long prior thereto, the said defendant company was, and ever since has been, a common carrier of property and persons from Montreal, in the province of Quebec and Dominion of Canada, to Portland, in the State of Maine, and between Lewiston, in said Maine and said Portland, and in the prosecution of its business of common carriers possessed, used, and controlled certain railroads, with their tracks, switches, sidings, stations, telegraph lines, with their appurtenances; also certain cars, tenders, and engines, and employed certain general managers, directors, superintendants, depot and station masters, master mechanics, road masters, chief engineers, conductors, brakemen, switchmen, firemen, telegraph operators, train despatchers, and other servants and agents for the purpose of managing, conduct-
3 ing, controlling, and carrying on its business as a common carrier, and by whom it carried on its said business and was represented in the management and performance of its said business, and it was then and there the duty of said defendant company towards its engineers and other persons in its employ or carried upon its trains, to provide and keep in repair, safe, suitable, and unobstructed tracks, and safe and suitable

switches, rolling stock, cars, engines, and machinery, telegraph lines, stations, and apparatus for its said business, and to make and provide proper rules, regulations, and directions for the transaction of its business and the management of its trains and engines and to cause and ensure the observance thereof by its servants and employees, and it was then and there the further duty of said defendant company to provide and employ in its said business a sufficient number of careful and attentive and competent managers, superintendants, directors, depot-masters, station agents, chief-engineers, master mechanics, road masters, train despatchers, telegraph
4 operators, conductors, brakemen, firemen, engineers, switchmen, and other servants, and not to employ or retain in its employ any careless, negligent, incapable, or incompetent persons as its servants, agents, or employees, and not to employ any servant in the performance of any duty for which he was not by reason of want of experience or otherwise fitted and competent; and it was then and there the further duty of said defendant company to prudently and safely in all respects to arrange and manage its said business and the trains and engines connected therewith without carelessness, negligence, or omission, and despatch all trains and engines over their said railroads in a safe and suitable manner, properly provided with competent and suitable conductors, engineers, brakemen, and other servants to safely manage and direct the same—and not to permit any passenger or special train or engine to leave any station without the proper clearance and the direction of the proper train despatcher when required by the rules of said company, or by care and prudence, and
5 not to allow any special train or engine to run upon said roads without the proper orders therefor or in such a manner as to produce collision between said trains and engines; and the plaintiff avers that, upon said sixth day of March, A. D. 1875, he was in the employ of the defendant company as an engineer and was in the discharge of his duty as such engineer upon one of the trains of said defendant company, then running from said Lewiston to said Portland, being then and there upon the engine of said train as engineer and in the exercise of due care.

Yet, the said defendant company, regardless of its said duty toward the plaintiff, did not on said sixth day of March, A. D. 1875, provide from said Lewiston to said Portland unobstructed tracks, safe and clear for the running of said train upon which said plaintiff was engineer as aforesaid, and did employ negligent, careless, and unskilful managers, superintendants, chief engineers, station agents, depot masters, road masters, tele-
6 graph operators, switchmen, conductors, engineers, firemen, brakemen, train despatchers, and other servants, for the management of the trains and the transaction of the business of said company; and failed to employ and use a sufficient number of said servants above named to safely and properly manage and perform the business of said company, and did not then [and] there have suitable and sufficient telegraph lines, stations, apparatus, and operators to do and perform safely and properly the business of said road and manage its trains; and did not then and there furnish proper and suitable cars, engines, sidings, switches, signals, and other means for the safe running of its trains and transaction of its business, and did not safely, carefully, and properly dispatch and regulate the running of its trains and engines over said track from Lewiston to Portland; and did not make and provide proper rules, regulations, and directions for the transac-

tion of its business and the management of its trains and engines; and did not ensure or procure the observance thereof by its servants and employees
7 other than the plaintiff, and did not then and there prudently and safely manage said business, and dispatch, run, and manage said trains and engines. And the plaintiff avers that on said sixth day of March, A. D. 1875, whilst the plaintiff was riding upon the train and engine of the defendant company from Lewiston to Portland as aforesaid, at the instance of the defendant company, and discharging his duty as engineer as aforesaid, the said defendant company did carelessly and negligently dispatch a certain engine and tender from Portland to a place on said road called Yarmouth, and from thence over said road, and did then and there, at said Yarmouth, carelessly and negligently place said engine and tender under the charge and control of a careless, negligent, and incompetent and inexperienced person, the servant of said defendant corporation, who acted as engineer of said engine, and who was then and there assisted by a careless, negligent, inexperienced, and incompetent fireman, said per-
8 son acting as engineer being in an unfit condition, mentally and physically, to perform the duty of engineer upon said engine and tender, and the day being very foggy and misty, and did then and there negligently and carelessly permit said engine and tender to pass over the track of said railroad in the direction to meet said train and engine upon which the plaintiff was riding as engineer as aforesaid; said engine and tender then and there being under the charge and control of the aforesaid careless, negligent, incompetent, and inexperienced servants acting as engineer and fireman, carelessly and negligently employed by the defendant company, and did then and there negligently and carelessly omit to provide said engine and tender with a conductor or brakeman or other servant, or require their employment upon said engine and tender, as it was in duty bound to do, and did not notify or warn the plaintiff, or any person upon the train where the plaintiff was riding, of the approach of said engine and tender, and did permit said engine and tender to leave said Yar-
9 mouth as aforesaid, without any proper clearance order or permission of any train dispatcher or proper officer of said defendant corporation, improperly and carelessly opening its switches for the passage of said engine and tender by its careless and incompetent switchman employed at said Yarmouth.

And the plaintiff avers that by reason of the wrongful and negligent acts and omissions, and want of care and skill in the management of its business and trains, on the part of the defendant corporation, as hereinbefore set forth, and by reason of the wrongful acts, negligence, inexperience, and incompetency of the servants of said corporation other than the plaintiff as aforesaid, having charge of the said tracks, stations, telegraphs, switches, trains, engines, and tenders of said defendant corporation as aforesaid, and by reason of the negligence, carelessness, want of skill, and incompetency of the servants of the defendant company having charge of said engine and tender aforesaid, as engineer and fireman,
10 and by reason of the fault of said corporation in the employment of said incompetent and unsuitable engineer and fireman to take charge of said engine as aforesaid, without other assistance or aid in running and managing the same, and by reason of the fault and negligence of said defendant corporation in not providing said engine and tender

with a suitable and competent conductor, brakeman, or other servant, beside said acting engineer and fireman, nor requiring the employment of such conductor, brakeman, or other servant upon said engine and tender, and by reason of the fault and negligence of said defendant corporation in not providing proper rules and regulations and directions for the management of its business and the running of its trains, and its failure to require the observance by its servants of such rules and regulations as it did establish, as was its duty to do, as hereinbefore alleged, and in permitting said engine and tender to leave without a proper clearance or order as aforesaid, and by reason of the fault and negligence of the defendant corporation in not providing a telegraph station
11 and operator at Yarmouth Junction on the line of its said road, and a suitable telegraph operator at Yarmouth and at North Yarmouth and Yarmouth Junction, and a suitable train dispatcher, and in not providing a suitable and sufficient number of telegraph stations and operators on the line of said railroad to properly do the business of said corporation, and by reason of the fault and negligence of said defendant corporation in improperly dispatching said engine and tender in an improper and negligent manner as aforesaid, and at an improper time and state of weather, said engine and tender, when moving at a high and improper rate of speed, met the train upon which the plaintiff was riding at a place between North Yarmouth and Yarmouth Junction, and violently came in collision therewith, shattering both engines, and the plaintiff was then and there thrown with great violence from said engine upon which he was riding, without fault upon his part, and was then and there jarred, shocked, crushed, bruised, and
12 mangled, the legs of said plaintiff were crushed, bruised, and broken, and his ribs were broken and injured, his shoulders and arms were bruised, dislocated, and paralyzed, his back was torn and injured, he was rendered unconscious, he received great internal injury, and was confined to his bed for a great length of time, and received other grievous injuries, bruises, wounds, and hurts in and about his head, body, and limbs, whereby he suffered great pain, has become a cripple, has been put to great expense, has lost his health, and will never recover the same, and has been and always will be disabled from the transaction of his business as an engineer, and the transaction of other business whereby he was accustomed to receive great gain, and has been put to great expense for medicine, medical attendance and nursing, and has suffered great damage both in mind and body.

And the plaintiff avers that all said injuries and damages received by him, and all said wrongful acts and doings, were caused and done
13 by the carelessness, negligence, omissions, and wrong-doing of said defendant company as aforesaid, and not through the negligence or wrongful act of said plaintiff, to the damage of the said plaintiff (as he says) the sum of thirty thousand dollars ($30,000).

This action was originally brought for and entered in the superior court holden at Portland, within and for the county of Cumberland, in the State of Maine, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and seventy-seven, when and where the defendant company filed a petition, alleging that it then, and on the thirteenth day of March then last past (being the date of the writ), was a corporation created by the legislature of the province of Canada, and that the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of

costs, and praying that the said cause might be removed for trial into the next circuit court of the United States to be holden at Portland, within and for the district of Maine, on the twenty-fourth day of September, A. D. 1877.

14 And thereupon at said term the bond in such case made & provided having been filed and approved, the prayer of the said petition was allowed, and it was ordered by the court that this court proceed no further, but that the same be removed to the circuit court of the United States for the district of Maine, as prayed for in said petition. And at said September term of this court said cause was entered by the defendant company, and copies of the case filed therein on the first day of its session, according to the provisions of the statutes of the United States, in such case made and provided. Said cause was thence continued to April term, A. D. 1878, and on the first day of May next ensuing was filed the following:

*Motion to amend writ.*

UNITED STATES OF AMERICA:

Circuit court of the United States, district of Maine, ss:

OLIVER P. CUMMINGS
*v.*
THE GRAND TRUNK RAILWAY COMPANY OF Canada.

15 And now comes the said plaintiff, and petitions and gives this honorable court to be informed that he is, by birth, a citizen of the said State of Maine, in the said United States of America, and that at the time of the commencement of this suit now pending in said court, to wit, on the thirteenth day of March, in the year of our Lord one thousand eight hundred and seventy-eight, was, and from that time to the present day has continued to be, a citizen of said State of Maine, and that at the time of making the writ and declaration in said suit the allegation that said Oliver P. Cummings was a citizen of said State, as above set forth, was inadvertently omitted.

He therefore prays that he may be allowed to amend said writ, and to insert in said writ the following allegations and additional description immediately after the name and description of the plaintiff, as now contained in the writ in said cause, viz: "And a citizen of said State of Maine; so that the same shall read as follows, viz: "Oliver P. Cummings, of Paris, in the county of Oxford and State of Maine, and a citizen of said State of Maine."

OLIVER P. CUMMINGS.

Subscribed & sworn to before me.

A. H. DAVIS,
*Clerk C. C. U. S.*

16 Which motion was by the court (Shepley, J.) overruled, and on the same day was filed, counsel for defendant objecting, the following

*Additional record.*

STATE OF MAINE,
*Cumberland, ss:*

At the superior court, which was begun and held at Portland, within and for the county of Cumberland, on the first Tuesday of May, being the first day of said month, anno Domini 1877.

By Hon. Joseph W. Symonds, justice.

OLIVER P. CUMMINGS, OF PARIS, IN THE county of Oxford and State of Maine, plaintiff,

*versus*

THE GRAND TRUNK RAILWAY COMPANY OF Canada, a foreign and alien corporation, created and existing by the Queen of the United Kingdom of Great Britain and Ireland, by and with the advice and consent of the legislative council and the legislative assembly of the province of Canada, said corporation and the stockholders thereof being foreign citizens and subjects, and citizens of said kingdom and of the Dominion of Canada,
17 and subjects of said Queen, said corporation having its principal place of business at Montreal, in said dominion, and also having an established place of business and doing business at Portland, in the county of Cumberland and State of Maine, defendants.

In a plea of the case, for that on the sixth day of March, A. D. 1875, and long prior thereto, the said defendant company was, and ever since has been, a common carrier of property and persons from Montreal, in the province of Quebec and Dominion of Canada, to Portland, in the State of Maine, and between Lewiston, in said Maine, and said Portland, and in the prosecution of its business of common carriers, possessed, used, and controlled certain railroads, with their tracks, switches, sidings, stations, telegraph lines, with their appurtenances; also certain cars, tenders, and engines, and employed certain general managers, directors, superintendents, depot and station masters, master mechanics, road masters, chief engineers, conductors, brakemen, switchmen, firemen, telegraph operators,
18 train despatchers, and other servants and agents, for the purpose of managing, conducting, controlling, and carrying on its business as a common carrier, and by whom it carried on its said business, and was represented in the management and performance of its said business, and it was then and there the duty of said defendant company, towards its engineers and other persons in its employ, or carried upon its trains, to provide and keep in repair safe, suitable, and unobstructed tracks, and safe and suitable switches, rolling stock, cars, engines, and machinery, telegraph lines, stations, and apparatus for its said business, and to make and provide

proper rules, regulations, and directions for the transaction of its business and the management of its trains and engines, and to cause and ensure the observance thereof by its servants and employees, and it was then and there the further duty of said defendant company to provide and employ in its said business a sufficient number of careful and attentive and competent
19 managers, superintendents, directors, depot masters, station agents, chief engineers, master mechanics, road masters, train despatchers, telegraph operators, conductors, brakemen, firemen, engineers, switchmen, and other servants, and not to employ or retain in its employ any careless, negligent, incapable, or incompetent persons as its servants, agents, or employees, and not to employ any servant in the performance of any duty for which he was not, by reason of want of experience or otherwise, fitted and competent. And it was then and there the further duty of said defendant company to prudently and safely, in all respects, *to* arrange and manage its said business, and the trains and engines connected therewith, without carelessness, negligence, or omission, and despatch all trains and engines over their said railroads in a safe and suitable manner, properly provided with competent and suitable conductors, engineers, brakemen, and other servants, to safely manage and direct the same, and not to permit any passenger or special train or engine to leave any station without the proper clearance, and the direction of the proper train
20 dispatcher, when required by the rules of said company, or by care and prudence, and not to allow any special train or engine to run upon said roads without the proper orders therefor, or in such a manner as to produce collision between said trains and engines. And the plaintiff avers that upon said sixth day of March, A. D. 1875, he was in the employ of the defendant company as an engineer, and was in the discharge of his duty as such engineer upon one of the trains of said defendant company, then running from said Lewiston to said Portland, being then and there upon the engine of said train as engineer and in the exercise of due care. Yet the said defendant company, regardless of its said duty towards the plaintiff, did not, on said sixth day of March, A. D. 1875, provide, from said Lewiston to said Portland, unobstructed tracks, safe and clear for the running of said train upon which said plaintiff was engineer as aforesaid, and did employ negligent, careless, and unskilful managers, superintendents, which engineers, station agents, de-
21 pot masters, road masters, telegraph operators, switchmen, conductors, engineers, firemen, brakemen, train dispatchers, and other servants for the management of the trains and the transaction of the business of said company, and failed to employ and use a sufficient number of said servants above named to safely and properly manage and perform the business of said company, and did not then [and] there have suitable and sufficient telegraph lines, stations, apparatus, and operators to do and performly safely and properly the business of said road and manage its trains, and did not then and there furnish proper and suitable cars, engines, sidings, switches, signals, and other means for the safe running of its trains, and transaction of its business, and did not safely, carefully, and properly dispatch and regulate the running of its trains and engines over said track, from Lewiston to Portland, and did not make and provide proper rules, regulations, and directions for the transaction of its business and the management of its trains and engines, and did not ensure or procure

22 the observance thereof by its servants and employees other than the plaintiff, and did not then and there prudently and safely manage said business, and dispatch, run, and manage said trains and engines. And the plaintiff avers that on said sixth day of March, A. D. 1875, whilst the plaintiff was riding upon the train and engine of the defendant company from Lewiston to Portland as aforesaid, at the instance of the defendant company, and discharging his duty as engineer as aforesaid, the said defendant company did carelessly and negligently dispatch a certain engine and tender from Portland to a place on said road called Yarmouth, and from thence over said road, and did then and there at said Yarmouth carelessly and negligently place said engine and tender under the charge and control of a careless, negligent, and incompetent and inexperienced person, the servant of said defendant corporation, who acted as engineer of said engine, and who was then and there assisted by a careless, negli-
23 gent, inexperienced, and incompetent fireman, said person acting as engineer being in an unfit condition mentally and physically to perform the duty of engineer upon said engine and tender, and the day being very foggy and misty, and did then and there negligently and carelessly permit said engine and tender to pass over the track of said railroad in the direction to meet said train and engine upon which the plaintiff was riding as engineer as aforesaid, said engine and tender then and there being under the charge and control of the aforesaid careless, negligent, incompetent, and inexperienced servants, acting as engineer and fireman, carelessly and negligently employed by the defendant, and did then and there negligently and carelessly omit to provide said engine and tender with a conductor or brakeman or other servant, or require their employment upon said engine and tender as it was in duty bound to do, and did not notify or warn the plaintiff or any person upon the train where
24 the plaintiff was riding of the approach of said engine and tender, and did permit said engine and tender to leave said Yarmouth as aforesaid, without any proper clearance, order, or permission of any train dispatcher or proper officer of said defendant corporation, improperly and carelessly opening its switches for the passage of said engine and tender by its careless and incompetent switchman employed at said Yarmouth.

And the plaintiff avers that by reason of the wrongful and negligent acts and omissions and want of care and skill in the management of its business and trains on the part of the defendant corporation as hereinbefore set forth, and by reason of the wrongful acts, negligence, inexperience, and incompetence of the servants of said corporation, other than the plaintiff as aforesaid, having charge of the said tracks, stations, telegraphs, switches, trains, engines, and tenders of said defendant corporation as aforesaid, and by reason of the negligence, carelessness, want of skill, and incompetency of the servants of the defendant company having charge of said
25 engine and tender aforesaid as engineer and fireman, and by reason of the fault of said corporation in the employment of said incompetent and unsuitable engineer and fireman to take charge of said engine as aforesaid without other assistance or aid in running and managing the same, and by reason of the fault and negligence of said defendant corporation in not providing said engine and tender with a suitable and competent conductor, brakeman, or other servant beside said acting engineer and fireman, nor requiring the employment of such conductor, brakeman, or

other servant upon said engine and tender, and by reason of the fault and negligence of said defendant corporation in not providing proper rules and regulations and directions for the management of its business and the running of its trains, and its failure to require the observance by its servants of such rules and regulations as it did establish, as was its duty to do as hereinbefore alleged, and in permitting said engine and tender to leave without a proper clearance or order as aforesaid, and by
26 reason of the fault and negligence of the defendant corporation in not providing a telegraph station and operator at Yarmouth Junction, on the line of its said road, and a suitable telegraph operator at Yarmouth, and at North Yarmouth, and Yarmouth Junction, and a suitable train dispatcher, and in not providing a suitable and sufficient number of telegraph stations and operators on the line of said railroad to properly do the business of said corporation, and by reason of the fault and negligence of said defendant corporation in improperly dispatching said engine and tender in an improper and negligent manner aforesaid, and at an improper time and state of weather, said engine and tender when moving at a high and improper rate of speed met the train upon which the plaintiff was riding, at a place between North Yarmouth and Yarmouth Junction, and violently came in collision therewith, shattering both engines, and the plaintiff was then and there thrown with great violence from said engine upon which he was riding, without
27 fault upon his part, and was then and there jarred, shocked, crushed, bruised, and mangled, the legs of said plaintiff were crushed, bruised, and broken, and his ribs were broken and injured, his shoulders and arms were bruised, dislocated, and paralyzed, his back was torn and injured, he was rendered unconscious, he received great internal injury, and was confined to his bed for a great length of time, and received other grievous injuries, bruises, wounds, and hurts in and about his head, body, and limbs, whereby he suffered great pain, has become a cripple, has been put to great expense, has lost his health and will never recover the same, and has been, and always will be, disabled from the transaction of his business as an engineer, and the transaction of other business, whereby he was accustomed to receive great gain, and has been put to great expense for medicine, medical attendance, and nursing, and has suffered great damage both to mind and body. And the plaintiff avers that all said injuries
28 and damages received by him, and all said wrongful acts and doings were caused and done by the carelessness, negligence, omissions, and wrong-doing of said defendant company as aforesaid, and not through the negligence or wrongful act of said plaintiff, to the damage of the said plaintiff (as he says) the sum of thirty thousand dollars.

The writ in this action is dated March 13th, A. D. 1877. Service made as follows:

CUMBERLAND, *ss:*

MARCH 23*rd*, *A. D.* 1877.

By virtue of the within writ, I have this day attached a chip, as property of the within-named defendant company—and at the same time I made service on the within-named defendant company by leaving at the business office of said defendant company in Portland, in said county, a true and

attested copy of the within writ, for said defendant company to appear and answer at court.

Fees: Service, 50; copy, 5.00; trav., .12—5.62.

E. R. BROWN,
*Deputy Sheriff.*

29 This action was entered in this court at the present term thereof. And now on the fourth day of this term the said Grand Trunk Railway Company of Canada, by John Rand, its attorney, appeared, and at the time of entering its said appearance, made and filed the following:

*Petition.*

To the hon. justice of the superior court for Cumberland Co., holden at Portland, within and for the county of Cumberland, on the first Tuesday of May, A. D. 1877.

Respectfully represent the Grand Trunk Railway Company of Canada, that they are now, and were on the thirteenth day of March last, a corporation created by the legislature of the province of Canada, that a suit has been commenced against said railway company by Oliver P. Cummings, of Paris, in the State of Maine, a citizen of said State of Maine, returnable to the present term of this hon. court, and which has been duly entered in said court; and that the matter in dispute exceeds the sum or value
30 of five hundred dollars, exclusive of costs. Wherefore the said Grand Trunk Railway Company of Canada, now at the time of entering their appearance in this court, pray that the said cause may be removed for trial into the next circuit court of the United States, to be holden at Portland, within and for the district of Maine, on the twenty-fourth day of September, A. D. 1877. And your petitioners herewith offer good and sufficient surety for the entering in such court on the first day of the session copies of said process against them, and for their appearance then and there, and for the doing of all other and further acts by law required in the premises.

GRAND TRUNK RAILWAY COMPANY OF CANADA,
By JOHN RAND, *Its Att'y.*

And at the same time the said defendant made, filed, and offered the following bond, with the surety thereon:

Know all men by these presents that the Grand Trunk Railway
31 Company of Canada, a corporation created by the legislature of the province of Canada, as principal, and John Rand, of Portland, in the State of Maine, as surety, are holden and stand firmly bound and obliged unto Oliver P. Cummings, of Paris, in the State of Maine, in the sum of two hundred dollars, to be paid to the said Cummings, his executors or administrators, to the which payment we bind ourselves firmly by these presents. Sealed with our seals and dated the first day of May, A. D. eighteen hundred and seventy-seven.

The condition of the above obligation is such, that whereas the said Grand Trunk Railway Company of Canada have this day filed in the superior court for the county of Cumberland, in the State of Maine, a petition for the removal for trial into the next circuit court of the United

States, to be holden at Portland, within and for the district of Maine, on the twenty-fourth day of September next, of a suit commenced against said Grand Trunk Railway Company by the said Cummings and now
32 pending in said superior court; now, if upon the granting of said petition the said Grand Trunk Railway Company of Canada shall duly enter in said circuit court of the United States to be holden as aforesaid, on the first day of its session, copies of said process against them, and shall then and there appear and do and perform all other and further acts by law required in the premises, then this obligation shall be void.

Witness:

GRAND TRUNK RAILWAY COMPANY OF CANADA,
By J. HICKSON, *Treasurer.* [L. S.]
JOHN RAND. [L. S.]

And thereupon it having been made to appear to the satisfaction of the court that the allegations contained in said petition are true, and that, at the time of the commencement of said suit, the said Oliver P. Cummings was and ever since has been a citizen of the State of Maine, and that the said defendant, at the time of the commencement of said suit, was and ever since has been a foreign and alien corporation and a foreign citizen and subject, and that the matter in dispute in this suit
33 exceeds the sum or value of five hundred dollars, exclusive of costs, and that the surety upon said bond is good and sufficient, said bond is approved, and said petition, bond, and surety are accepted by the court.

It is therefore ordered by the court that this court proceed no further in this cause, but that the same be removed to the circuit court of the United States for the district of Maine as prayed for in said petition.

Recorded by—

F. J. LITTLEFIELD, *Clerk.*

STATE OF MAINE,
*Cumberland, ss:*

Clerk's office, superior court, Portland.

[SEAL.] In testimony that the foregoing is a true copy of the record in the case of Oliver P. Cummings v. The Grand Trunk Railway of Canada, I make this certificate, and hereunto set my name, and affix the official seal of the court aforesaid, this first day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

34 F. J. LITTLEFIELD,
*Clerk of the Superior Court in the County aforesaid.*

STATE OF MAINE,
*Cumberland, ss:*

I, John Appleton, chief justice of the supreme judicial court of the State of Maine, hereby certify that F. J. Littlefield, esq., whose signature is above affixed, is clerk of the supreme judicial court of said State, for the county of Cumberland, and ex-officio clerk of the superior court for said county of Cumberland, and is by law the proper person to make out and certify copies of all records and proceedings of said courts holden

within and for said county of Cumberland; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation is in due form of law.

In testimony whereof I have hereunto set my hand and the seal of said court, this first day of May, anno Domini one thousand eight hundred and seventy-eight, and in the 102nd year of the Independence of the United States of America.

[SEAL.] JOHN APPLETON.

35 And after the filing of said additional record, to wit, on the same day, the defendant filed the following:

*Motion to dismiss.*

Circuit court U. S., first circuit, Maine district, April term, 1878.

OLIVER P. CUMMINGS
*v.*
GRAND TRUNK RAILWAY CO. OF CANADA.

And now, on this first day of May, 1878, and before said cause is opened to the court and jury, the defendant corporation moves the court that this action be dismissed for want of jurisdiction, and that the same be remanded to the court in which it was originally commenced.

By JOHN RAND,
*Its duly authorized Agent.*

Which motion was by the court overruled.

And now, the said defendant corporation comes and defends, &c., and says it is not guilty in manner and form as the plaintiff has in his
36 writ and declaration alleged, and of this puts itself on the country.

By J. & E. M. RAND,
*Its Attorneys.*

And the plaintiff likewise.

By STROUT & ANDREWS,
*Pl'ff's Attorneys.*

Whereupon said cause is committed to jury, duly impanelled and sworn, who, after hearing the evidence produced on the part of the defendant, as well as on behalf of the plaintiff, and the arguments of the respective counsel, and mature deliberation thereon had, return their verdict and "find that the defendant corporation is guilty in manner and form as the plaintiff in his writ and declaration hath declared against it, and assess damages for the plaintiff in the sum of fifteen thousand seven hundred and eight dollars and thirty-three cents ($15,708.33).

And now, after verdict and before judgment in the above-entitled cause, the defendant corporation moves the court that the verdict returned by the jury may be set aside and a new trial granted, because said verdict is against law and against evidence and the weight of evidence, and because the damages are excessive.

37 Whereupon hearing was had before Shepley, J., and said motion was argued by counsel, but before rendering his decision thereon, Shelby, justice, deceased; and thereafter a rehearing on said motion for a new trial was had before Clifford and Fox, JJ., and it was ordered that said motion be and the same was granted, and said verdict was thereupon set aside and a new trial ordered.

Said cause was thence continued from term to term to April term, A. D. 1879, Lowell, J., presiding.

And now, the case came on to be heard before a jury, duly impanelled and sworn, and after the introduction of the plaintiff's testimony, the defendant corporation requested of the court a certain instruction to the jury, which the court declined to give; and then, after a full hearing of the evidence, the counsel for the plaintiff requested the court to give a certain instruction to the jury which instruction was then and there by the court given; to which refusal, and to the giving of which instruction, the defendant then and there, in open court and before the case was committed to the jury, ex-

38 cepted and prayed that said exception might be allowed.

And the said defendant's bill of exceptions was then and there allowed and signed by the presiding judge; and then and there placed on file and made a part of this record. And said cause is thereafter then and there committed to the jury, who, after mature deliberation thereon, return their verdict and find that the defendant is guilty in manner and form as the plaintiff in his writ and declaration hath declared against it, and assess damages for the plaintiff in the sum of ten thousand seven hundred and ninety-one dollars ($10,791.00).

And now, after verdict and before judgment in the above-entitled cause, the defendant corporation moves the court that the verdict returned by the jury may be set aside and a new trial granted, because said verdict is against law and against evidence, and manifestly against the weight of evidence.

Whereupon hearing was had before Lowell, J., and said motion was argued by counsel. Said cause was thence continued to this term, when said motion was denied.

39 And now comes the plaintiff—the motion for a new trial having been denied—and moves for judgment upon the verdict rendered in said cause for the amount of said verdict, and interest thereon from the rendition of said verdict to the time of said judgment, and for costs, and that execution issue upon said judgment according to law.

OLIVER P. CUMMINGS,
By GROUT & HOLMES,
*His Attorneys.*

Said motion was heard by Clifford, J., and on the 8th day of October, A. D. 1879, it was ordered that judgment be entered on the verdict.

All which being seen and understood, it is therefore considered by the court here, to wit, on the eighth day of October, in the year of our Lord one thousand eight hundred and seventy-nine, that the said Oliver P. Cummings recover of the said Grand Trunk Railway Company of Canada, said sum of ten thousand seven hundred and ninety-one dollars, with interest thereon from the day of the rendition of the verdict, to wit, from the first day of May, in the year of our Lord one thousand

40 eight hundred and seventy-nine, being two hundred eighty-two dollars and thirty-six cents, in all amounting to the sum of eleven thousand seventy-three dollars and thirty-six cents ($11,073.36), debt or damage, and his costs of suit taxed at .

Attest:

A. H. DAVIS, *Clerk.*

Recorded from the original papers and minutes.

By A. H. DAVIS, *Clerk.*

41 *Bill of exceptions.*

UNITED STATES OF AMERICA:

Circuit court United States, first circuit, Maine district, April term, 1879.

OLIVER P. CUMMINGS
*v.*
GRAND TRUNK RAILWAY CO. OF CANADA.

Be it remembered, that at a term of the circuit court of the United States for the first circuit, begun and holden at Portland, within and for the district of Maine, on the twenty-third day of April, A. D. 1879, by the honorable John Lowell, circuit judge, came Oliver P. Cummings, of Paris, in the State of Maine, a citizen of the State of Maine, and by a writ of trespass on the case declared against the Grand Trunk Railway Company of Canada, an alien and foreign corporation created and existing by the Queen of the United Kingdom of Great Britain and Ireland, by and with the advice and consent of the legislative council and of the legislative assembly of the province of Canada, having its principal place of business at Montreal, in said dominion, and also having an es-

42 tablished place of business, and doing business at Portland, in the county of Cumberland and State of Maine, said action having been commenced on the thirteenth day of March, A. D. 1877, by writ returnable in the superior court for the county of Cumberland, in the State of Maine, at the term holden at Portland, in said county, on the first Tuesday of May, A. D. 1877, and the matter in dispute exceeding five hundred dollars, exclusive of costs, the said railway company, at the time of entering its appearance in said suit before said superior court, filed its petition for the removal of said cause for trial into the next circuit court to be held in this district, and offered good and sufficient surety for entering in such court on the first day of its session copies of the process; and said railway company did, on the first day of the session of the circuit court in this district, next after the first Tuesday of May aforesaid, to wit, at the session of the circuit court held at Portland, in said district, on the twenty-fourth day (the 23d day being Sunday) of September, A. D. 1877, appear and enter in said circuit court said action and copies of said process against it; and the said Cummings, the plaintiff, also then and there appeared, and

43 said action was thence continued from term to term of said circuit court to the present term, when the parties appeared, and said defendant pleaded the general issue, which was joined by the plaintiff, as by the writ and declaration and the plea aforesaid, all of record, will appear; and

thereupon said cause came on for trial before said circuit court, at said April term before a jury empanelled for that purpose; and the said plaintiff, to maintain and prove the issue on his part, introduced witnesses who testified as follows, to wit:

OLIVER P. CUMMINGS, the plaintiff, testified:

In 1875 I was in the service of defendant corporation, as an engine-driver, between Portland and Lewiston; first commenced working for defendant in 1852, and worked ever since till accident; first worked as track repairer, then as fireman; was fireman for about two years, perhaps less, then became an engine-driver, first on freight train for three or four years and then on passenger trains; commenced running passenger trains between Lewiston and Portland, in July, 1874, and continued until accident; my pay was $3 per day; my health was good; age then 44; considered myself in perfect health.

44 Number 3 passenger train came from Gorham morning of accident; left there about half past three a. m., and was due in Portland about ten minutes before my train; I passed No. 9 freight train at New Gloucester; I had to meet the up-passenger train, No. 4, leaving Portland about 7 a. m.

I left Lewiston at 7.20 a. m.; first station from Lewiston was Lewiston Junction, about 5 miles; then Danville Junction, 1½ or 2 miles; then New Gloucester, 4 miles; then Pownal, 4 miles; then North Yarmouth, 3 miles; then Yarmouth Junction, 3 miles; then Yarmouth, 1 mile; then Cumberland, 2 miles; then Falmouth, 3 miles; then Portland, 5 or 5½ miles.

In 1875 there was telegraph at defendant's stations at North Yarmouth and at Yarmouth; was none at Yarmouth Junction. Yarmouth Junction is the Maine Central Railroad Crossing. There is a siding at North Yarmouth.

I was furnished with defendant company's Book of Rules.

(Book put in, marked C.)

Duties of engine-driver are to look over engine; see that it is provided with fuel and oil; to take orders from conductor; to look after signals; to look after his engine, water, and steam gauge; to keep his hand on lever; to listen for sound of anything out of order in machinery; to keep

45 his eyes on track to see if clear; to whistle, and see bell rung at crossings.

Conductor's business to look after train and see to crossing orders, &c. Wild engines are run by special rule, to keep clear of all trains; are also sometimes run by telegraph orders. Train despatcher's office was at Island Pond. Conductor's duty to get orders and give signals to start. I have run wild engines a few times; consider it wants the best man we have to run a wild engine; regular trains run by time-table; conductor's business to obtain clearance order at station, when there is a conductor. I left Lewiston at 7.20 that morning for Portland; nothing unusual occurred up to the time of collision. I passed the train from Portland at Pownal; that train had a white flag on engine and on rear end of train; both white and red flags in use on defendant's railway; red signifies special coming, with same right of way as train bearing flag; white signifies special coming with no special right of way, but to keep clear of all trains.

There was no signal for me to stop at North Yarmouth. I only stopped there to leave passengers, unless signalled. Whilehouse and my
46 fireman were on my engine. I saw no one else there until I turned round to jump off. Shackley had been there, and, I think, had jumped off when I turned round. I was just between the engine and tender when they struck; that was March 6th. I recovered my consciousness about the last of April.

(Witness describes his injuries.)

I remained in Auburn from March 6th to June 8th, and then went to South Paris. None of the Grand Trunk officers came to see me, except Martin, once. I have done considerable labor on farm by working along carefully. Joseph Martin has care of despatching engines at Portland; he looks after the engines, and attends to sending out men on engines.

I had known Charles D. Noyes four or five years; he had formerly fired on the road between Portland and Lewiston; he had fired for me; I supposed him to be a fireman at time of collision. I had never known of his being promoted to an engine-driver. I calculated he was about 20 years old at the time of accident. I never knew of his running a wild engine or of his discharging the duties of a conductor; he had been for a short
47 time running a passenger train between Portland and Gorham, N. Hampshire, as an engine-driver, in the absence of Walker, who was sick. I had run a wild engine myself sometimes. I don't now recollect ever meeting a wild engine between Portland and Lewiston. No train so difficult to run as a wild engine; in running a wild engine with no right of way an engine-driver has to act as driver and conductor; he has to look after the running of his engine and after all flags and signals; nothing in duties of engine-driver to fit him for a conductor. It requires time to familiarize a man with the management of an engine so as to run it; engine-drivers and conductors are required to have watches; first I saw was a smoke-stack through fog; I reversed my engine and did all I could to stop my train; whistled down brakes; it was very foggy morning. When a fireman is promoted to driver it is known and talked about all along the road.

On cross-examination, he testified:

I was familiar with the road from Portland to Danville Junction;
48 at time of accident and before, there were telegraph stations on the road at Falmouth and at Yarmouth, and at North Yarmouth, and at New Gloucester, and at Danville Junction. In 1874 and down to time of accident there was no telegraph station at Yarmouth Junction; I had known that during all the time. I have run wild engines; can't say how many times; have run without third man once or twice; have run with conductor; it is very common thing to run wild (or empty) engines on Grand Trunk Road, and it has been custom for last five years or more to send them without a conductor or third man; I knew of such custom for a year—more or less; I knew of it before the accident. I saw the white flag on train at Pownal; I don't know whether white flag indicated that the special was the next train, generally it was the next. I was furnished with the time-tables and with rules on back of them, and I was perfectly familiar with all the rules, for running trains, that were on the back of time-tables.

Before the accident I had met Charles D. Noyes running as engine-driver

on No. 4 passenger train; he was running that train as engine-
49. driver; that No. 4, with Noyes as engine-driver, met and crossed my train every other morning at Pownal. I did not know that Noyes had been running No. 4 the whole month of February; think he had been running about two weeks; think it was about two weeks I saw him there; that is the best of my recollection. I had been in the habit of meeting him as engine-driver every other morning during the whole period, longer or shorter, that he had been running No. 4 passenger train. I was familiar with the rules on time-tables as to running wild engines.

50 Direct resumed:

The white flag did not indicate to me whether it was a single engine or a special train, a passenger train or a freight train that was coming. It indicated to me only that it was a train not on the time-table coming at some time.

As far as the custom was concerned, I might have made a mistake in what I said this forenoon. I could not swear I did know it was a custom; I never had seen but two or three engines come out in that shape; I had seen two or three engines with an engineer and fireman; I think that is the extent of my knowledge from any source concerning that matter.

Q. Had you received information from any person or from any quarter that there had been any change in the manner of sending out wild engines from what it was when Mr. Corser had charge of the road? Any one informed you of that fact prior to 1875?

A. No, sir. My only knowledge was I had seen one or two engines come out in that way. I do not know the exigency which caused
51 those engines to come out without a third person upon them. I did not suppose they would call upon any man that came along to run out. I meant by what I said that I supposed if they called upon a man to come out, I had a right to suppose he would be fit to run out, a man that had experience in running. I had no reason to suppose that the road would send out a fireman, or a man who was in the class of firemen, in the charge of a wild engine. I had no reason to believe the management of that road would send out a wild engine under the charge of an inexperienced or second-class engineer.

Q. Did you ever know such a thing to be done, sending out a wild engine with an inexperienced or second-class engineer or fireman?

A. I do not know that I ever did; I cannot say I ever did. I had no reason to believe that Charles D. Noyes would be sent out upon a wild engine without a conductor with him, or any engine or any train without a conductor. I never run a wild engine while I was fireman. I never run one out before I had long experience as an engineer; I run a good many years before I run one, a number of years.

Q. Before the one or two instances occurred?

52 A. I run a good many years before I ever run a wild engine there.

(Dr. M. C. Wedgwood's testimony omitted.)
(Dr. James M. Bates's testimony omitted.)

JOHN EATON, called by plaintiff, testified:

Residence, Auburn. My business now is traveling agent for a manufacturing company. The first acquaintance I ever had with Oliver P. Cummings was after he got hurt. I knew him by sight, but never had any particular acquaintance with him till I was called to assist in helping take care of him. In the first place I was called by the physicians to help handle him. It took two or three strong men to handle him. There did not seem to be anybody that could handle him so well as he thought such and such ones who began to handle him in the first place; that is the way I came to be there.

Q. What did you observe as to the condition of his mind?

A. I thought by his talk and actions that he was wandering all the time for quite a length of time. Sometimes he seemed to be talking about his engine, running a locomotive. I could not really under-
53 stand what he did say a good deal of the time. He would look and say the wall was opening, and speak like that to me; I did not really understand what he meant by it. I recol[lect] the circumstance. I was not one of those who carried his wife to the room. The other young man that was hurt was at my house, and the first of it I had about all I could attend to.

Q. Did you assist him any other way than by helping him with your hands?

A. Some.

Q. Carry him or the family food?

A. Some. I assisted him some, and made up a purse for him and gave him. I think the rest of the neighbors assisted him by their charity. I was not there when his wife died. I think she lived some two weeks after this. The little child that she was the mother of did not live. I assisted about moving him at various times.

Q. What sort of a bed was he provided with?

A. He had a strong sheet put under him, and we had to roll him on that. Two would take hold, one hold of each corner, and kind of
54 roll him up, and two on the other side held the sheet tight. We would roll him up on that till we got him in position, where the physician wanted him to examine his wounds, held him in that shape, and laid him back. We had to do it by main strength. It always seemed to hurt him very bad. He complained a good deal when any of us handled him. We used the sheet in that way, so we could handle him without taking hold of him. It seemed to put him in distress to touch him. The physician ordered to have this sheet under him at all times. We had to shift that, and when we shifted it we had to roll him up on one side and get it under. The smell of rotted or putrified flesh was very offensive sometimes; they did everything they could to remedy it. I saw his wounds about every time they were dressed, and sometimes assisted Dr. Garcelon and others.

Cross waived.

(Dr. David P. Sawyer's testimony omitted.)

Mrs. MIRANDA B. CUMMINGS, called by plaintiff, testified:

I am mother-in-law of Oliver P. Cummings, mother of his wife. At

the time of his injury I was at his house taking care of his
55 wife. She had a young child. He was brought to the house, and I saw him. I was present when the physicians dressed his limbs. I took care of him all the while through till he got well, or as well as he is now, both there and at So. Paris. I went with him. From the time he was hurt till near the last of April he was very wandering, sometimes running his engine, and sometimes he imagined seeing a good many things in the room; we had to take down every picture in the room, they worried him so. Sometimes he would ask me if I did not see those walls opening. His suffering was very extreme. I never saw anything like it, and it cannot be described. I helped wash the wound on his back, and I did it a great many times alone when the physicians were not there. I used to dress it between their coming. Its condition as to odor was very bad for a few days—a week or two—and we had to use a good deal of carbolic acid and other things in order to stay in the room, it smelt so bad. He was hurt Saturday, and his wife, my daughter, lived two weeks, till Monday.

56 Q. When you went to So. Paris, by whom was Mr. Cummings taken care of and supported?

A. I took care of him. We furnished his support among us; I had a little money that was given to him by his railroad brethren and the neighbors at Auburn, that I kept on purpose for his use. I took his family and went there. It was seventeen weeks from the time we went home before he was able to go out at all or sit up much. I took care of him day and night. I had a lounge in the room, and would camp on that, and I was up from one to twelve times a night. Some nights he would rest considerably well under opiates. Other nights he would be in such distress I would have to get up every few minutes. He could not move what we call his well leg.

Q. What was the appearance of the leg and foot not injured?

A. There came on erythema, as the doctor called it. It was very red from his back to the hip, and crossed over down to where the bunch was on his well leg, red as it could be.

Q. As to his shoulder, whether that troubled him to lie on it?

57 A. He could not bear on that at all; he could not be turned on that at all; he could not use his right arm for four months. I fed him every mouthful he ate. I have not received any pay for my services. Before this injury he was perfectly well; he weighed two hundred. From that day to this he ought not to have done an hour's work, but he has been obliged to do some little work. I have known him to take his hoe and go out and hoe a few hills in the garden and come in and vomit himself almost to death; sometimes I thought he would die vomiting. I think a man like that ought not to work. He has been some better about that since he has been on the farm this summer. I was not present when he was dizzy and fell into the machinery; I heard them tell of it.

Cross-waived.

Miss EDITH BUMPUS, called by plaintiff, testified:

I am telegraph operator at North Yarmouth, and was in 1875. At that time William Dunn was station agent at that place.

Q. Whether or not that was one of the stations at which the morning

train from Lewiston, on which Cummings was engineer, stopped;
58 and if so, under what circumstances?

A. They only stopped when they were flagged; a red flag was used to stop them. It was placed at the side of the station.

Q. Was there a little bracket at the side of the station?

A. Yes; a bracket at the side of the bay-window—right by the side of the bay window.

Q. Was that close to where your telegraph was?

A. Yes; the bay-window is in the office. I remember the morning of this collision well; Oliver P. Cummings' train was not stopped at the station. There was no signal put out.

Q. Did you receive any message from Yarmouth, from the telegraph operator at Yarmouth, in the employ of the Grand Trunk, during that morning? And if so, state all you did receive.

A. The operator at Yarmouth called me, and said, "Stop;" then said, "O K," signifying it was all right.

Q. When you received the last message, the "O K," you did not put out any flag?

A. No.

Q. Where was Cummings' train when this was telegraphed?

A. I do not know the distance exactly; it was about at the upper
59 switch. The main line of the Grand Trunk passes directly by the station, the station being on the west side of the track, on the right-hand side of the track coming from Lewiston to Portland. The main track runs by the building.

Q. On the Lewiston side, that is, up towards Lewiston, is a turnout?

A. The side track is just opposite the station, too; I do not know how far it runs up towards Lewiston from the station—a few rods may be. I know it is not very far. The whole side track holds twenty-six or twenty-seven cars.

Q. And above towards Lewiston?

A. I should think it would be about fifteen cars; I do not know how long a car is.

Q. Who was the telegraph operator at Yarmouth at that time?

A. As far as I recollect the agent was away. The agent was the operator at that time. I cannot say who it was telegraphed me.

Q. Would you know the name if it was spoken?

A. No, I cannot say who it was. I do not remember.

Q. Was it St. Laurent?

A. I know he was acting as agent there; but I cannot say who telegraphed me.

60 Q. The agent and operator were the same person, you say?

A. Yes, I do not recollect how long he had been there.

Q. Give us your best recollection—a month or six weeks?

A. I have no idea; it is quite a long time and I do not remember those points. Mr. Caswell was the regular agent there at that time; he went away to Cuba. I believe St. Laurent had been working at other stations. I do not know what place he came from. I believe he came from Canada.

Q. He was a new man in the place of Caswell, the old agent?

A. I do not know how long he had been there—do not recollect; it was a very foggy morning.

Q. After you received this "O K" the train went by?
A. Yes, it went by just as they were saying "O K."

Cross-examination:

Q. How long a space intervened between the word "stop" and the letters "O K?"
A. Just enough to make a few dots.
Q. How long would it take?
A. Two or three seconds.
Q. There was nothing but the word "stop?"
A. That is all.
61 Q. Then the two or three seconds—then the letters "O K?"
A. Yes.
Q. And just as the "O K" was received Cummings' train went by?
A. Yes.
Q. Would it have been possible for you to have stopped Cummings' train?
A. No, it would not.

Direct resumed:

I am in the employ of the Grand Trunk. I was not at the coroner's inquest at Lewiston. William Dunn, the station master, was there. William Dunn was in the office at the time that the message was received from St. Laurent.

Q. Didn't you tell him what St. Laurent telegraphed to you—the word "stop" and then said "O K?"
A. I repeated to him the word "stop." By the time I said "O K", it is all right," the train was just going by; he would not have had time.
Q. Didn't he go to the door immediately?
A. No, he did not have time to get to the door.
Q. Are you quite sure about that?
A. I know that he could not possibly have got out and stopped
62 that train as well as I recollect anything. I know that was my firm conviction at the time; at least he would not have had time to have put out the flag.
Q. Couldn't he have cried out to a brakeman of that train?
A. I do not think they would have been likely to have heard him; they went by very fast. William Dunn is at No. Yarmouth. I have not talked with any one in relation to this matter. I had not forgotten that St. Laurent was at Yarmouth; but all I said was, I was not sure who was at the key.

Edward C. Stowell, called by plaintiff, testified:

I make it my home at Norway now. I formerly resided at South Paris. In March, 1875, I was fireman on the Grand Trunk Railway; I had been fireman about six months. I remember the time of the injury to Oliver P. Cummings. I was on the engine with Charles D. Noyes that came in collision with this engine that Cummings was on. I was on there in the capacity of fireman. My age is twenty-five now; I was twenty-
one at that time. I had been fireman six months. On that morn-
63 ing I started to go to Gorham, New Hampshire, from Portland. I was detailed to go by Joseph Martin. I had known Noyes ten years. I was running on the same road that he was for six months.

Q. What was his grade, on the road, of employment at that time?

A. I knew him no other than a fireman.

Q. He was a fireman, and so known?

A. Yes.

Q. Had he taken, temporarily, the place of some engineer in running a passenger train?

A. Yes. I do not remember the number of the passenger train. It was the morning passenger train leaving here about seven o'clock. I do not know to a minute the time it left. It was the passenger train between Gorham and Portland.

Q. From what place to what place had you been running as fireman, and with whom?

A. Portland to Gorham with Andrew Jackson principally. I had been with other men while running from Portland to Gorham with Jackson. I had the same points of arrival and departure that Noyes had. When we started to go out of Portland Andrew Jackson had charge of the engine. He was an old and experienced engineer.

64 Q. When you got out to Yarmouth, did you make a change with any person?

A. Yes.

Q. Why was the change made? What was the reason of it?

A. Jackson told me that he wanted to get off to go a gunning. He had talked this to me on the engine previous to the exchange. Joseph Martin, the master mechanic, is a man that goes gunning.

Q. A sporting man in that way. Were they going together—Jackson going with Martin?

A. I should not say as to that. I cannot say.

Q. Did Martin send out an order for this change?

A. He did; that is, the order was found on the blackboard in the round-house in the morning, when we got in, about three o'clock. Jackson went there and took the order off, and I saw the order myself.

(Paper shown to witness.)

Q. Is that the order that was sent out on the train by Martin; the same that was in the round-house?

A. Yes; I should say it was.

(Plaintiff's counsel reads the order just shown to witness, dated Portland, March 6, 1875, in evidence.)

Q. What was your knowledge and experience about running an
65 engine or the duties of conductor?

A. It was not very heavy.

Q. Had you much of any knowledge about it?

A. No.

Q. Able to afford any assistance to anybody about running an engine, except to stoke it and oil it?

A. No. When we left Portland it was very foggy—as much so as I ever saw it. It was pretty foggy outside; I did not notice much inside the round-house. I got on this engine with Jackson. The morning passenger train had preceded us. I suppose that train had a conductor; I was not there when the train left; the natural supposition is it had. That had been gone eight minutes when we started with this engine. I do not think Joseph Martin was there when we left; I saw nothing of him.

Q. What did he tell you about being right off? What directions did Joseph Martin give you about starting off?

A. All the notice I had about it—the night before he leaves an order in the round-house for them to call the men that are going out in the morning. And he sent a call-boy for me to come down and be ready at six o'clock to get my engine to come out, and be ready to follow
66 the passenger train.

Q. You did not hear him give any order to Jackson?

A. No. We were not connected in any way with the morning passenger trains. We followed them on a white signal. We left Portland eight minutes behind them. We caught a glimpse of them once or twice between Portland and Cumberland, when they were going up the hill at Cumberland. We could see them going up the hill.

Q. After you left Cumberland, did you see anything of this train?

A. No. We did not couple with the train and run out together. When we got out to Yarmouth we run our engine on the side track. We got there before the down train got there.

Q. The moment the down train got there what took place?

A. The engine was run on to the side track by the engine-driver; he got off of the engine, went on to the passenger side—Jackson did; I saw him go into the station and come out again, and when the passenger train came
67 out again he got on to Noyes' engine, and Noyes picked up his traps and came over on to the engine I was on; all done in a minute and a half or two minutes perhaps. Noyes had come from Gorham that morning. I do not know what time he had to get up. The train left there about half past three or twenty minutes past, if I remember right.

Q. How many miles from Gorham to Yarmouth had he driven that morning?

A. About eighty miles, to the best of my judgment. It is ninety-one from Gorham here, and it is eleven from here to Yarmouth.

Q. What is his ordinary day's work?

A. Portland to Gorham. When he crossed from one engine to another I think he took his overalls in his hand, and I do not know but his coat. I saw him pick up some things. He got off and came to the engine I was on.

Q. What did the train do upon which he came?

A. Passed along towards Portland. Noyes and I started the
68 other way towards Gorham. I saw Jackson start the other train for Portland; I suppose he went in on it.

Q. Had Noyes any notice that he was to be turned right around and go back on an empty engine, to your knowledge?

A. No.

Q. You did not know till the night before that you were going out on the empty engine, or that there was to be any change?

A. No; I got in about three o'clock in the morning and went home. The first thing I knew I was called to come out again; about six o'clock, I should think, the boy came after me.

Q. You had been riding all night, and were called to come out again at six?

A. Yes; we were doubling the road a good deal then, working night and day.

Q. Any others beside Noyes, that you know of, to make this change in order to let Jackson go gunning?

A. I do not know. I do not remember now.

Q. After you left Yarmouth, did anybody call for the switch?

69 After you got on to the engine, what did you do first?

A. I told the switchman to put the switch over. I do not know how old that switchman was; he was a fellow about my age, I should say. He was switchman at Yarmouth.

Q. His name Fred. A. Cann?

A. I believe his name was Cann; I do not know his given name; I heard him called Cann a number of times. He did not make any stop or any inquiry of me; he throwed the switch right over, and Noyes and I started to go to Gorham. We made a stop at Yarmouth Junction, ten or fifteen rods this side of the station.

Q. No signal for you to stop at Yarmouth Junction?

A. There was; there always is. They have a signal up, and when we stop they drop it, and we go right along; that is the way it was that morning. They dropped it, and we passed right along.

Q. Who was in charge at Yarmouth Junction?

A. The station agent?

70 Q. Yes.

A. I think his name was Woodman, if I remember right. I should say he was about my age—about twenty or twenty-one, in my judgment. I do not know how long he had been there. I had seen him there before this. I do not recollect how long.

Q. He gave you no warning as to any coming train?

A. No, nobody did. Noyes did not go into the depot at Yarmouth to get any clearance order. I did not.

Q. You did not know or think anything about it?

A. No; that was not my business.

Q. Make any inquiries, either of you, as to any other train coming down on that road at the station?

A. No.

Q. Did you let out the engine after you started from Yarmouth?

A. Yes; the engine-driver did. He let her out twenty miles an hour, or twenty-five.

Q. Twenty to twenty-five?

A. That would be my judgment, understand. It was a very

71 foggy morning; could see ten or twelve rods ahead, I should say.

Q. What did you next see?

A. I saw the outline of an engine coming on the same track we were.

Q. What did you do?

A. I took myself off. I jumped. I saved my life. I saw the two engines when they came together. Noyes jumped.

Q. How long before the two engines came together did Noyes jump?

A. I should not think he had any more than struck the ground. He had not a chance to move at all. He just struck the ground, I should say, in my judgment. The shock was very great, so they heard it on the Maine Central. The concussion threw the engines apart, I should say, pretty near as far as across this room.

Q. Stave them all up?

A. Nearly; it wrecked them. I saw Oliver Cummings. I helped take him up on a door and carry him into a passenger car. When
72 I first saw him he laid some fifteen or twenty feet from the track, on his back. It was my impression he was unconscious.

Q. You were somewhat excited?

A. A little mite, under the circumstances. This fireman and I took him on a door and carried him into a car. Nobody else laid there beside him. I saw them take a man down from the top of the engine, who was wedged into the coal. I saw them getting him out. I did not pay much attention.

Q. While you were there for the six months, how was the rule in relation to getting clearance orders observed upon that railroad?

Mr. RAND. If there is a rule let them put it in; it speaks for itself.

Mr. STROUT. I produce rule 7 and put it in.

Q. What was the fact about the observance of that rule on that road for the six months you were on it before this accident?

Mr. RAND. I object, on the ground that this man was not one of the persons referred to in the rule, and could not know anything about it.

73 Q. Whether you stopped at telegraph stations or whether you went right by without stopping; I mean the engines upon which you had been running?

COURT. I understand the objection to be that the question should be confined strictly to what this witness knows.

Q. You may answer what the fact was, according to your knowledge—how it was observed before the accident.

A. Sometimes they went by telegraph stations without them, and sometimes they stopped and got them.

Q. Have you ever been at a station when a clearance order was obtained, and they signed a sheet, so you know as to that?

A. No. I left the road two or three months after the accident.

Q. After that accident did anybody go by any station without any clearance order?

A. Yes. A few days after we were out there working. I was in the employ of the company, and Mr. Martin detailed me to go out to
74 work wrecking. We went out and worked in the forenoon, and came back to Yarmouth to get dinner; and Mr. Martin, with a man by the name of Bridges, some officer, do not know what capacity, went into the hotel there to get dinner. I says to a young fellow who broke on the train, "Lets us go and get dinner." We went in and ate dinner with them. While we were eating dinner a train went by there, I should say, going twenty miles an hour. Philbrook was running it. I knew him. I saw him. I says, "I guess they are not going to wait for clearance orders to-day." This fellow beside me laughed.

Q. That is all the notice that Mr. Martin took of it?

A. I do not recollect of his saying anything; he looked up.

Q. That was this very Yarmouth station?

A. Yes; I am brother-in-law of Charles D. Noyes. Noyes is now at the elevator, in the employment of the Grand Trunk.

Q. What became of him after this accident?

75 A. He was discharged from running a locomotive engine. He went to Whitefield, N. H.; he came here from Whitefield to run this engine at the elevator.

Q. Whether or not that was about the time that the trial of this case was first to come on?

A. I believe it was. The Grand Trunk did not put him back on the road.

Cross-examination:

I am now in a shoe factory at work; I was fireman on this engine of Jackson's that went out; before I was fireman I served in the capacity of brakeman on the Grand Trunk.

Q. When you got out to Yarmouth on your engine, with Jackson, did he go into the telegraph office?

A. I cannot say; I saw him going into the depot, but he shut the door; I cannot tell whether he went into the telegraph office or not. The telegraph office was in the same building, but there was another door on the inside that led to the telegraph office, if I remember right, a door from
76 the station-room, that you could pass through into the telegraph office, if I remember right. I saw Jackson go into the station; I remained on the engine.

Q. Did you see Jackson come out?

A. I saw him getting on to the engine, yes; I saw him come out; I think I saw him at the time he came out of the station; I am very positive; I cannot tell whether he communicated with Noyes in any way; the engine was moving by the station when he got on, and they run along down below where I was.

Q. Who had this order?

A. Jackson had it leaving Portland, Noyes had it getting on to the engine I was on.

Q. You saw it after Noyes got on to your engine?

A. Yes; and previous.

Q. Did you see Jackson holding any communication with Noyes in any way, or giving him anything?

A. I saw him standing close by him on the engine; as they passed by I could look into the cab and see them standing side by side; I
77 saw them together; that was after Jackson had been into the station.

Q. You called for the switch?

A. Yes.

Q. What train were you running on as fireman?

A. 16 and 23, I believe. I did not run on 4 regularly; I had been on that train within six months. That was the train that went out ahead of us. Noyes run on that train every other day.

Q. Do you know whether he went over the road more than once each day from Gorham?

A. No; he came down one day and up the next.

Q. He went out on the morning train; was that an express train to Gorham?

A. What do you mean by that? It was a passenger train. I do not know whether you call a passenger train an express train or not.

Q. Did he go any farther than Gorham? Was it the Montreal train?

A. I wouldn't say about that. I know it used to run no further
78 than Gorham, but in the summer time that train run through, No. 4 did.

Q. Did Noyes go out every other morning on No. 4?

A. Yes; I know that he was running that train. I did not see him every morning.

Q. How long had he been running that as engine-driver?

A. My judgment would say about three months.

Q. Did your duties on the engine you went out on require you to do anything more than to keep it fired up?

A. Keep it cleaned.

Q. On the way, I mean.

A. No.

Q. That was the extent of your duties?

A. Yes.

Q. As fireman?

A. Yes.

Q. When the engine was in the engine-house you worked on it sometimes?

A. Yes; and sometimes on the road.

Q. But your business was to keep it fired up.

A. Yes. I had nothing to do with obtaining clearance orders or with crossings.

Q. Did your duties as fireman require you to be acquainted with
79 all the rules of the road?

A. No; it was engine 312 that Noyes and I left Yarmouth on; after I and Noyes left Yarmouth I saw Noyes examining the time-table.

Q. Did he ask you any questions about what you had passed?

A. He said at Yarmouth, "What train have we crossed here this morning?" I says, "We just crossed 25 and a special at Cumberland, and you have an order from Jackson that says '17 of yesterday and 11 of this a. m. is cancelled.'" He says, "That only leaves No. 9 freight for us to cross." I says, "That is all." He then says, "I will see how far we can go to cross them." He took his watch out to see what time No. 9 was due at New Gloucester, and he says, "We have got twenty-five minutes to reach Gloucester." He says, "That will be time enough." I says, "Yes." And he gave her a little steam and started little faster. I did not make any objection to going out according to orders. I was able to go out.

Direct resumed:

80 Putting on a little steam is synonymous with letting her out, shaking her out a little faster.

Q. You went, that foggy morning, at the rate of twenty or twenty-five miles an hour?

A. That would be my judgment.

Cross resumed:

Q. I forgot last night to ask you about the train you testified you heard pass Yarmouth. Did you see it, or hear it?

A. I saw it. It was a freight train. It did not stop at Yarmouth station; went right along. I do not recollect of any other instance in particular, now.

Direct resumed:

I said, in answer to Mr. Rand, that Noyes asked me what trains we had crossed; he says, "What freight trains have you crossed?"

Q. Did that include Oliver Cummings' train that was coming from Lewiston?

A. No.

Q. What was the number of that freight train that you gave?

A. 25, if I remember right.

81 Q. It did not include that [Cummings']?

A. No.

Q. It did not include that at all?

A. No. It was not spoken of by anybody.

Q. At the time, and before this injury, did you board at the same place with your brother-in-law, Charles D. Noyes?

A. Yes. I had boarded with him off and on for three years, prior to that time. I did not occupy the same sleeping-room with him. His wife was here, keeping house here, and I boarded there with them. I never heard of his being promoted to be engineer, or anything of the kind.

Q. I understood you to say you caught sight once or twice of a train in front of you. Explain how that was.

A. We ran near enough to them so we could see the hind end of their train.

We stopped at Cumberland to cross a freight train. We did not dare to go to Yarmouth for fear we might run into them going into the station. That was the expression made by the engine-driver.

Q. On account of the fog?

A. Yes; being so thick. Andrew Jackson was in charge of the

82 engine then. He was an old and experienced engineer.

WILLIAM S. YOUNG, called by pl'f, testified:

Residence, Auburn. I am proprietor of the Elm House there. In 1875 I knew Oliver P. Cummings. At that time he lived in Auburn, near the Grand Trunk station, on the opposite side of the street. I saw him at his house the next day after his injury, and continued to see him from that time till he was taken to South Paris. I watched with him nights. I used to carry him food, and so did the rest of the neighbors. They were very thoughtful and kind to him and his family. He laid flat on his back.

Q. Whether or not you had to lift him to cool the bed?

A. We did raise him. I saw those holes in his back that have been described. I was present when Dr. Garcelon cut away the mortified flesh. There were some of the pieces three, or four, or five inches large; should think one piece five or more, and the others perhaps an inch or an

83 inch and a quarter; they came from this hole in his back where it was gangrened. It scented considerably.

Q. Do you remember being there in the morning when he came to himself?

A. I sat up with him that night. I think it was the last of April; from the middle to the last; I cannot recollect to a day. When he came to himself, the first indications, he thought he was injured the day before; he looked across on the park, looked out of the window, and seemed to be himself, his mind clear.

Q. Did he say he thought he was injured the day before?

A. Yes; he spoke of that, and said he thought it was the day before. It was a pleasant morning, the sun had come up before I left.

Q. Did you call his attention to its being green, and that there was snow on the ground when he was injured at that time?

A. I do not recollect whether I did or not. I do not recollect whether I did at any time; I might have done so, but I do not recollect positive.

Previous to this, the nights when I was with him he seemed
84 to be wandering; we had to take the pictures down, hanging around the room. He seemed to see strange objects. He seemed to be on his engine, and seemed to dwell upon that more than any other thing. Sometimes the walls would seem to him to separate and close. About two weeks after his injury his wife died. I helped take her remains to the station. We took them into the room where he was, and raised the casket to the side of his bed, and tipped it up; as he laid on his back, he cast his eyes down; we raised the casket up as well as we could for him to get a sight of the remains, but I don't think he realized it was her. I do not recollect distinctly whether his child died before or after that. His left leg was swollen some, and the foot was sort of a purple cast, black and blue, and quite badly swollen. There were two openings in his back, one larger than the other. When they syringed one the water would pass from one to the other. There were some weeks that he could not keep
85 any nourishment in his stomach. I saw the scrotum; that came off.

Cross waived.

WILLIAM DUNN, called by pl'f, testified:

Business, station agent at No. Yarmouth, in the employ of the Grand Trunk; I was summoned in here last night; I declined to come without a summons; I was a witness before the inquest at Lewiston; do not recollect how long that was after the accident.

Q. Was it within a day or two, or a few days?

A. I cannot state positive. It was within a month.

Q. Where were you in the morning, or about the time, before and after the train from Lewiston going towards Portland, on which Cummings was, past North Yarmouth?

A. I was at the station. It did not stop. I had no word to stop the train.

Q. What took place there? What was said to you by the operator?

A. She said, "Stop." She didn't say what. Then she said "O K."

86 Q. Did she tell you that she received that from St. Laurent?

A. I think she did. I do not recollect whether I was on the platform or inside when she spoke to me. I think I went in. I think I was on the platform outside when she sung out to me. I would not be positive. She sung out to me, and I asked her what was said.

Q. Did you go in to see what it was, and then go out again?

A. I do not recollect whether I was inside or out.

Q. Did you look up and see the train?

A. I saw the train. As near as I can judge, it was then about thirty-five or forty rods away from me, coming down from Lewiston to pass the station.

Q. Could you see the train in the depot?

A. By looking out the bay window.

Q. When it was thirty or forty rods up the track must you not have been to the door or on the platform to see it?

A. I think I must.

87 Q. If you were in the depot where did you go to see the train; how far?

A. If I was in the depot I was at the counter, probably ten feet.

Q. If you were out on the platform where did you go after she hallo/ed to you and you saw the train coming?

A. I went into the depot. I was on the platform when the train went by. I recollect that.

Q. If St. Laurent had telegraphed you to stop the train, and you had done so, would it have been on your own responsibility?

A. Yes.

Q. What do you mean by that?

A. If I stopped it properly I should have to have orders from the train dispatcher at Island Pond. In case of danger, if I thought there was danger, I should stop the train.

Q. But you would have done it on your own responsibility?

A. Yes.

88 Q. If the dispatch had come, as sta/ted, to stop the train, and you had acted upon your own responsibility, might you not have stopped the train after the announcement was made?

A. If she had got the message in season before they passed I might have stopped it.

Q. If you had acted upon your own responsibility, without waiting for a dispatch from the train dispatcher to stop the train, might you not have stopped the train after she sung out to you, if instead of being "O K" the train dispatcher had said stop Cummings' train, and you had acted on your own responsibility, hadn't you time to stop it?

A. I cannot say as to that; I might have had time and might not.

Q. Couldn't you have swung your hat?

A. Yes. I might have swung the flag and stopped the train; the engineer had passed.

Q. Couldn't you have cried out and swung your hat and stopped that train; haven't you testified before "If the dispatch had come as sta/ted I might have stopped the train?"

A. I might have said "probably I could."

89 Cross-examination:

Cummings' train was No. 1. That did not stop at our station.

Q. You really had no right to stop that train unless you had orders from the train dispatcher; but if you had been notified of danger?

A. I should have stopped it. No. 1 never stopped at that station unless it had passengers to leave or was signalled to stop, that I recollect of. They were not booked to stop there, but if they had passengers to leave they stopped, and if we put up a signal they stopped. I cannot tell how long an interval there was between the word "stop" and the letters "O K." I do not recollect.

Q. Was it any more than the two dots?

A. I cannot say as to that.

Q. This was nothing but the word "stop?"

A. That is all she told me, and then says "O K."

Q. If it had contained the words "stop Cummings' train," was there time for you [to] stop it before it passed after you received it?

90 A. Probably I could. I cannot state exactly as to that. I might; if I could have got the engineer's attention I could have stopped it. They probably had run by some distance, but he probably would have hauled up. If I recollect right that train, No. 1, was little behind time.

Q. Are you able to state at what precise time it passed?

A. I should judge somewhere about ten or fifteen minutes past.

Q. I ask you whether you now recollect?

A. I do not seem to recollect now.

FRED. A. CANN, called for pl'f, testified:

I am telegraph operator in the Boston & Albany depot, Boston. In 1875, I was switchman on the Grand Trunk at Yarmouth station. I was nineteen years old then.

Q. What other duties did you have to perform besides that of switchman?

A. Handling freight and baggage; assisting in that. St. Laurent had charge of the station and of the telegraph. When he came there
91 he came from up the road. I presume from Canada. I do not know what part.

Q. Was he a new man, or had he been there a long time?

A. He was a new man. At the time of this injury he had been there, according to my best recollection, about four or five weeks. The regular station agent and telegraph operator was at Cuba on account of his health. I do not know whether St. Laurent was married or not. I should think he was about thirty. Besides tending the telegraph he sold tickets and way-billed the freight; he attended to all way-bills and all the writing there and sold tickets at the station when trains passed.

Q. Whether or not his duties called him to stand at the window of that ticket office while the train was there till passengers had their tickets till it was ready to start?

A. Yes.

Q. Was there anybody else placed there at that time whose business it was to attend to the telegraph exclusively?

A. No.

Q. Whether or not he had any duties as to clearance orders and
92 directing trains when to start, besides that.

A. He used to fill out those clearance orders.

Q. At that time was there a sheet for conductors to sign who took clearance orders?

A. I cannot remember. I recollect the morning of the accident. When the wild engine in charge of Charles D. Noyes left I was at the switch. The down train had passed. I' was very foggy at that time. When the engine left they called for the switch, and I gave it to them.

Q. You saw the engine come up?

A. Yes.

Q. Did you see the change from one to the other—see Noyes on that engine?

A. I think I saw him when he passed. I did not see whether any clearance order was obtained, because it was not my duty. No other reason.

Q. After the train passed, where did you go?

A. I came back to the station.
Q. Did any person make inquiry as to where this train could pass?
A. Yes; the hackman, Mr. Russell.
Q. Where the engine could pass?
A. He asked me where they were going to pass—the hackman did.
93 Q. (By the COURT.) Where the engine was going to pass the passenger train?
A. Yes.
Q. Had St. Laurent made any inquiry to your knowledge?
A. Not of me.
Q. Of any person?
A. The baggage-master, I think.
Q. He inquired of the baggage-master where they could cross?
A. Yes.
Q. How long was it before you went into the depot?
A. Soon after they had left; perhaps three or four minutes.
Q. What was St. Laurent doing?
A. He was sitting at the instrument then. I do not know what he had been engaged in before that time.
Q. State while you were there at Yarmouth, what the observance of the rule about obtaining clearance orders was with freight trains, and that class of trains—I do not mean passenger trains—was it observed always, or was it not?
Mr. RAND. I object. This man was a switchman.
Q. Whether or not you were learning telegraphy at the time?
94 A. I was.
Q. Were you in and about the depot?
A. Yes. I have been at that station going on three years, on and off.
Q. Prior to the injury to Oliver Cummings, state from your own knowledge what the fact was as to conductors or others in connection with trains obtaining clearance orders.
(Objected to.)
COURT. If you say you expect to connect it with the company and with Noyes, I think it is admissible. I will save the point if you (Mr. Rand) desire.
Mr. RAND. I would like to have it saved.
A. The rule was for them to get them.
Q. What was the practice under that rule while you were there?
A. Sometimes they got them and sometimes they did not.
Q. How frequently should you say they run by without, or did not get them?
A. So frequently I could not remember.
Q. Was it confined to any special conductor or engineer or train, except passenger trains, or was it general among the freight?
95 A. All trains. Before the accident I did not hear of any complaint or censure on the part of any of the officers of the road, because of their going by without them.
Q. At that time was there a record kept—a telegraphic record—and telegraphed as to trains that stopped, and trains that did not stop, which was transmitted to headquarters or the train dispatcher?

A. No; when a train left it was telegraphed.

Q. Where was it telegraphed to?

A. The train dispatcher took it at Island Pond. He was in charge of that part of the business on the road.

Q. Wherever it stopped was it telegraphed to the company?

A. They were reported whether they stopped or not—reported at the time they passed.

Q. That was the business of the operator to do that?

A. Yes.

Q. Was it not a fact that the train dispatcher in charge of this business was kept informed from each station of the position of all trains as they passed the station, when they started from any station?

96 A. I suppose he was.

Cross-examination.

St. Laurent was agent and telegraph operator at Yarmouth at the time Caswell was absent.

Q. Did you have any conversation with St. Laurent in reference to this empty engine having passed, immediately after it had passed?

A. I asked him where it was going to cross; I gave the empty engine the switch; the fireman from the engine called for the switch.

Q. I understand you to say that sometimes a clearance order was obtained, and sometimes not; what do you mean by sometimes not obtained; do you mean that they passed by without getting it?

A. Yes; sometimes they would stop, but would not go in and get it.

Q. Are you able to give any particular instance of that?

A. No; it happened so frequently I cannot remember; I remember of trains not getting them, passenger and freight.

97 Q. Give me the name of any conductor of any passenger train that failed to get a clearance order there?

A. I do not know as I could refer to the names of them.

Q. Did not you know the names of the conductors of trains that were passing there?

A. I did.

Q. I would like to have you tell me of some instance in which this rule was violated, and who violated it, and under what circumstances?

A. I do not know that I could name the parties; I cannot fix any time.

Q. Can you fix any time of the day on which such train passed?

A. Morning.

Q. Which train?

A. Passenger train bound to Portland.

Q. How near to the time of the accident do you recollect any instance of that kind?

A. I cannot tell you.

Q. Within a month?

A. I do not know.

Q. Within two months?

A. I cannot tell you.

98 Q. Within three?

A. I came back to the station.
Q. Did any person make inquiry as to where this train could pass?
A. Yes; the hackman, Mr. Russell.
Q. Where the engine could pass?
A. He asked me where they were going to pass—the hackman did.
93 Q. (By the COURT.) Where the engine was going to pass the passenger train?
A. Yes.
Q. Had St. Laurent made any inquiry to your knowledge?
A. Not of me.
Q. Of any person?
A. The baggage-master, I think.
Q. He inquired of the baggage-master where they could cross?
A. Yes.
Q. How long was it before you went into the depot?
A. Soon after they had left; perhaps three or four minutes.
Q. What was St. Laurent doing?
A. He was sitting at the instrument then. I do not know what he had been engaged in before that time.
Q. State while you were there at Yarmouth, what the observance of the rule about obtaining clearance orders was with freight trains, and that class of trains—I do not mean passenger trains—was it observed always, or was it not?
Mr. RAND. I object. This man was a switchman.
Q. Whether or not you were learning telegraphy at the time?
94 A. I was.
Q. Were you in and about the depot?
A. Yes. I have been at that station going on three years, on and off.
Q. Prior to the injury to Oliver Cummings, state from your own knowledge what the fact was as to conductors or others in connection with trains obtaining clearance orders.
(Objected to.)
COURT. If you say you expect to connect it with the company and with Noyes, I think it is admissible. I will save the point if you (Mr. Rand) desire.
Mr. RAND. I would like to have it saved.
A. The rule was for them to get them.
Q. What was the practice under that rule while you were there?
A. Sometimes they got them and sometimes they did not.
Q. How frequently should you say they run by without, or did not get them?
A. So frequently I could not remember.
Q. Was it confined to any special conductor or engineer or train, except passenger trains, or was it general among the freight?
95 A. All trains. Before the accident I did not hear of any complaint or censure on the part of any of the officers of the road, because of their going by without them.
Q. At that time was there a record kept—a telegraphic record—and telegraphed as to trains that stopped, and trains that did not stop, which was transmitted to headquarters or the train dispatcher?

A. No; when a train left it was telegraphed.

Q. Where was it telegraphed to?

A. The train dispatcher took it at Island Pond. He was in charge of that part of the business on the road.

Q. Wherever it stopped was it telegraphed to the company?

A. They were reported whether they stopped or not—reported at the time they passed.

Q. That was the business of the operator to do that?

A. Yes.

Q. Was it not a fact that the train dispatcher in charge of this business was kept informed from each station of the position of all trains as they passed the station, when they started from any station?

96 A. I suppose he was.

Cross-examination.

St. Laurent was agent and telegraph operator at Yarmouth at the time Caswell was absent.

Q. Did you have any conversation with St. Laurent in reference to this empty engine having passed, immediately after it had passed?

A. I asked him where it was going to cross; I gave the empty engine the switch; the fireman from the engine called for the switch.

Q. I understand you to say that sometimes a clearance order was obtained, and sometimes not; what do you mean by sometimes not obtained; do you mean that they passed by without getting it?

A. Yes; sometimes they would stop, but would not go in and get it.

Q. Are you able to give any particular instance of that?

A. No; it happened so frequently I cannot remember; I remember of trains not getting them, passenger and freight.

97 Q. Give me the name of any conductor of any passenger train that failed to get a clearance order there?

A. I do not know as I could refer to the names of them.

Q. Did not you know the names of the conductors of trains that were passing there?

A. I did.

Q. I would like to have you tell me of some instance in which this rule was violated, and who violated it, and under what circumstances?

A. I do not know that I could name the parties; I cannot fix any time.

Q. Can you fix any time of the day on which such train passed?

A. Morning.

Q. Which train?

A. Passenger train bound to Portland.

Q. How near to the time of the accident do you recollect any instance of that kind?

A. I cannot tell you.

Q. Within a month?

A. I do not know.

Q. Within two months?

A. I cannot tell you.

98 Q. Within three?

A. I do not know; I do not remember; I cannot fix any time, and cannot name any conductor.

Q. Do you know of more than one instance in which a morning passenger train passed without getting a clearance order?

A. Several.

Q. How many?

A. I cannot give you the number.

Q. Was it the first train down?

A. I do not know whether first or second, or who the conductor was, or who the engine-driver was. I did not communicate this fact to any of the superintendants or officers of the road.

Q. You never took any notice of it?

A. No; I had nothing to do with the clearance orders.

Q. How did you happen to know they had not obtained clearance orders?

A. I have seen them lying there in the office, made out, and not taken.

Q. Clearance orders filled out before the trains arrived?

A. Yes; I do not know how long before, but perhaps a few minutes.

99 LOWELL V. WALKER, called by pl'f, testified:

I am in the employment of the Grand Trunk; I was summoned to come up here; I did not want to come.

Q. Did you not try to keep out of the way of being summoned?

A. I should have kept out of the way. In 1875 I run train No. 4, from Portland to Gorham; I was taken sick the 21st of January; I was ill till the 15th of March, when I went to work again; Charles D. Noyes took my place.

Q. Were there a conductor and brakeman on your train?

A. Yes; I do not very often run them without; it was a passenger train; I do not know what Noyes's grade on the road was when he took my place.

Q. Have not you said that he was fireman?

A. I supposed he was fireman; he has fired for me.

Cross-examination:

I cannot state exactly how long I have known Noyes.

100 Q. How long had he, previous to your being taken sick, been on the train with you?

A. I cannot state how long; he fired for me some time, but I do not recollect exactly how long.

Q. Did you, at any time previous to your being taken sick, leave Noyes in charge of your engine; and, if so, to do what?

A. When I would get off of my engine for anything I would leave him in charge of her, for instance, to do some shifting, something of that kind, or getting the engine out of the house.

Q. How was Charles D. Noyes as to intelligence?

A. I always considered him an intelligent fellow.

Q. Did you ever see him handle the engine?

A. When he was firing for me he handled the engine, and always handled it very carefully; when I got off my engine I could trust him and feel perfectly safe; I do not recollect how long he fired for me; we change firemen pretty often, sometimes.

101 Q. During the period he was sometimes running with you as fireman, had you or not seen him running as engine-driver on any train or engine of any kind?

A. Yes, I have; I do not recollect how many instances now; I think I never saw him in charge of an empty engine on the road; I have seen him running the steamer train, mail train, and I have seen him on the freight. The steamer train is a special, a mail train connecting with the English steamers, sent out on the arrival of the English mails; he was on the engine of that train.

Q. Was he on there as engine-driver?

A. Yes, I suppose so; he was running the engine.

Direct resumed:

Q. You saw two men on the engine?

A. Yes.

Q. Who was with him?

A. I do not recollect now; it is impossible for me to tell who is on an engine passing me on the road for certainty always, unless I notice.

102 I noticed Noyes on the engine on the engineer's side; I supposed he was running the engine.

Q. That is all you know about it, because he stood in the cab of the engine on the engineer's side?

A. Yes; that is all we have of judging from. I should judge the cab to an engine was seven or eight feet wide; it is about square.

Q. In that little box there are two men who have various duties to perform?

A. Yes; fireman and engineer.

Q. And when the cars are in motion, sometimes the engineer sits on the right-hand side?

A. He sits on there when he is running.

Q. And when you have passed down by some time and met this train, where was it; at a station?

A. I do not recollect now. It must have been at a station, because I passed it.

Q. You saw this man Noyes looking out of the cab window on the engineer's side, and that is all you know about it?

A. That is all I know about it.

103 Q. Is there any law or rule that forbids firemen from looking out of the cab window on the engineer's side, when there is another train going by?

A. No; not that I know of.

Q. That is the running you have seen him do on a mail train; that is all the running you ever saw him do?

A. Yes; we suppose that in all cases where a man is on the right-hand side he is running.

Q. When they are stopping at a station waiting for a train to pass, does one man occupy just the same position every minute, or do they move about in the cab?

A. They move about, the same as anybody does.

Q. When you have got off your train and he has taken the engine to the round-house, how far did he have to go?

A. It is according to where the train was; sometimes when we stop at the Grand Trunk depot, in Portland, we have to run out on to the street and go around the back side of the depot.

Q. Whenever you have known Noyes to take the engine and run it to the round-house, how far did he have to run it?

104 A. Might have been a quarter of a mile and might have been half a mile.

Q. Might have gone a few rods.

A. Yes; you could not get into the house by going a few rods, as a general thing; have to run out on the track a piece to go into the engine-house.

Q. What did he have to do in order to do that; anything more than to manipulate that lever?

A. That is all any engineer has to do.

Q. Wasn't it all he had to do, run that engine out, stop it, have the switch set over, and then run it back into the round-house?

A. Yes.

Q. What rate of speed does an engineer drive an engine in the yard in running it into the round-house, ordinarily?

A. Perhaps about three or four miles an hour; generally move an engine pretty cautiously around the yard; go slow.

Cross resumed:

This instance of which I speak when I saw him on a special train, I do not recollect which train was in motion.

Q. According to the rules of the road, when a special, such as

105 you have described—a special mail train connecting with steamers and carrying the mails to Canada—is run over the road, what is the usual rule on the road as to that train going on to the siding, or the other train they meet going on to the siding?

A. The train that gets there first generally goes on to the siding; then it is out of the way to give the other a chance to go along. To save time is what it is done for. In this instance I speak of, I do not recollect how it was.

106 SOLOMON T. CORSER, called by plaintiff, testified:

I am now in charge of working of the road of the Rumford Falls & Buckfield Railroad; I am superintendent. I was formerly connected with the Grand Trunk from Portland to Island Pond, and a part of the time to Montreal as superintendent. I was connected with the road between sixteen and seventeen years, and between fifteen and sixteen I was superintendent. I have been one of the railroad commissioners of this State about seven years, I think. I have rode on engines a great deal. I have had under my charge passenger, freight, and special engines.

Q. Were you stationed at the Grand Trunk station for some years, and in what capacity?

A. My business was all over the road. My headquarters were here most of the time, part of the time at Island Pond.

Q. Recent years have you been at the Grand Trunk as inspector of customs?

A. Yes. I had charge of the business that came from Canada.

Q. State what the duties of a locomotive foreman or master mechanic—Joseph Martin's office—are?

A. So far as I know, on different roads they are differently situated. I do not know exactly what their duties are now on the Grand
107 Trunk; do not know what their regulations are now so much as I did when I was connected with the road. He is called a locomotive foreman. I suppose I do not know what his duties are now. The duties have been changed in the locomotive department since I left the road. In some cases the locomotive foreman has charge of the locomotives and the men while in the engine-house and not beyond; and sometimes they do beyond that. In some cases they have nothing to do with the men excepting in the engine-house and nothing to do with the engines; but on the Grand Trunk they used to have. When I was connected with the road they had nothing to do with the engines after they left the engine-house, nothing to say about them or the men. I believe the rules have been changed since, but I do not know.

Q. As to selecting men?

A. It is usually left to the foreman or master mechanic to select the man and the engine; it is supposed he will send out the engines for all regular trains, and specials if ordered.

Q. What qualities are requisite of a person to properly discharge those duties?

A. It wants a man who understands railroading well, and un-
108 derstands the rules and regulations well. In some cases foremen understand repairs and some do not.

Q. Whether or not it requires a man of cool judgment?

A. Of course, they are considered better. A man not excitable would be better.

Q. Is that not requisite to the proper discharge of the office?

A. I consider it better, and do in all cases of that kind. I have passed over the Grand Trunk frequently in different capacities. I know something of the amount of traffic and the number of trains.

Q. In dispatching a wild engine, an engine without cars attached, to run from Portland to Gorham, over the road in the day time, starting in the morning, state what would be requisite to be done in order to run such an engine safely and properly.

Mr. RAND. I object, unless made more definite.

Q. In the case last mentioned, what number of men would be necessary to the safe running of that engine—the proper running?

Mr. RAND. If the question is put to the witness as an expert, I would like to ascertain how much of an expert he is.

Mr. STROUT. I put it to him as an expert.

Mr. RAND. Then I have a right to ascertain whether he is.

109 Cross-examination:

Q. When did you leave the Grand Trunk Railway?

A. October, 1863.

Q. Have you had anything to do with its management or operation in any way since?

A. Not with the running of the trains. Nothing excepting as railroad commissioner examining the track.

Q. Do you know anything about their rules and regulations for the last ten years?

A. I have generally kept a copy of them in my pocket, and have read them very often.

Q. Are you familiar with them?

A. I think I am pretty well. I have one here, and never have been without one since I left the road; have not been without them three months altogether for the last thirteen or fourteen years.

Q. For the last sixteen years you have not been without their rules and regulations three months?

A. No.

Q. But you have known nothing as to the working of the road?

A. No.

Q. Or how it was worked?

A. No; that I do not pretend to know. I had occasion to go over the road pretty often.

110 Q. At the time you were acting as superintendent of this road, prior to the fall of 1863, was the road at that time, so far as the facilities for operating it by telegraphs and sidings, etc., in the same condition it is now?

A. No, sir; they have had some additional telegraph offices opened I understand, and some additional sidings since I left.

Q. How many telegraph stations were there between Portland and Danville Junction when you were superintendent?

A. I am not certain whether three or four; there were not a great many. There was not any at Falmouth, but there was at Yarmouth and North Yarmouth, I think.

Mr. RAND. I submit that a man who has not had anything to do with the road for sixteen years is not competent to testify as to how trains should be run over the road.

Direct resumed:

Q. Have you been over and examined the Grand Trunk road, and bridges connected with it?

A. Yes; and rolling stock.

Q. Whether or not the Buckfield road is connected with the Grand Trunk in any way?

111, 112 A. It is at Mechanic Falls.

Q. (By Mr. RAND.) When did you cease to be railroad commissioner?

A. Six years ago this spring, I think.

COURT. My impression is that Mr. Corser has qualified himself as an expert for any general questions of railroad management, if there are any such in the case.

Q. In railroad management, in sending out a wild engine to pass over the road in the face of other trains, other trains having the right of way, unless special orders are given, how many men are necessary to safely and prudently run that engine?

(Objected to.)

Mr. STROUT. We offer this witness, whom your honor has decided to be qualified as an expert in this particular business, and what we propose to prove by him, is that the manner in which this engine was sent out (I

do not now speak of the age and experience of the men), being sent out with a fireman and engineer, is an improper and unsafe way, for the reasons which I suppose he will give upon being asked, not because it is a mere matter of memory alone, but because the engineer in the dis-
113 charge of his duty, in running that engine over the road, has all that one man can properly attend to, even a man of great experience in running such a machine, and that the other man is required as assistant to do those things which the ordinary education of an engine man and his duty in manipulating his engine would not give him the time and necessary amount of thought to do. I put it upon the ground that this is a matter of special education and science differing from the common and ordinary pursuit of mankind, and therefore the testimony of an expert is admissible.

Mr. RAND. The view which I take is laid down in the opinion in vs.

COURT. I think when you have asked an expert what the things to be done and taken care of are, and perhaps what other railroads do under such circumstances, you have then exhausted all that is technical. The whole matter is simply a question of how far a man is elected to recollect, and there is no art or technicality about it, how far an engine-driver is likely to recollect. I think it is a question that a plain man can answer just as well as an expert.

114 Mr. STROUT. Then it is a question for the court and jury to determine, not as an expert question, but as a question of fact.

COURT. It is his opinion, but not as an expert. I will save the question if you desire.

Mr. STROUT. Yes, your honor, and I further offer to show by this witness, he being an expert, that in sending out, over a railroad having eighteen or twenty trains running upon it during the day and night, a single track road with sidings—a single engine without a train attached—that three men are necessary in order to prudently and safely run such engine over the road, reference being had to the safety of those on board the engine and other trains, that common safety and prudence require three men to be sent on the engine, one to act as fireman, one to act as engine-driver to work the engine, and the third man to perform the duties of conductor in obtaining proper clearance orders, ascertaining what trains, if any, are upon the track to come, and to perform the other duties which devolve upon a conductor of a general or special train in the usual and ordinary course of the business of a railroad.

(Objected to.)

115 COURT. I do not rule out any evidence that this witness can give as to what such and such person might do on the road, or what he might have to do; nothing which may enable the jury to judge of the necessity of a third man. But as a general question to an expert, I do not admit it.

Mr. STROUT. I understand the court to rule, that it is not admissible to ask it as matter of expert testimony.

COURT. As expert testimony.

Q. In running a wild engine over a road, what does an engine-driver have to do and to look after in running the engine (I do not now speak of any duty of conductor), in the manipulation of the engine?

A. He has charge of the engine, and the running of it.

Q. Where does he stand?

A. On the right-hand side.

Q. Where is his hand required to be?

A. His hand is usually on the lever that opens the throttle. Very often I have seen them stand with one hand on the lever that opens the throttle, and the other on the lever that reverses the engine. Sometimes one hand is on the lever, but usually have hold of lever that opens the throttle.

116 Q. Tell me what levers there are connected with an engine that an engine-driver manipulates from his place in the cab?

A. There are two for working the engine; one opening the throttle, and the other the reversing or moving lever to increase speed or shut off.

Q. Is there also a valve or cock connected with the boiler by which the steam is allowed to escape if too great pressure is had upon the engine?

A. Yes.

Q. Is there also a safety-valve upon the engine?

A. Yes.

Q. Whether or not, in connection with the engine, there is a glass water-gauge set?

A. Yes; about a foot or fourteen inches long, and about as big as a man's finger, with a hole in the center.

Q. Whether or not that has upon its face degrees, or is it plain?

A. Plain, I think; that shows the state of the water in the boiler.

Q. Does that vibrate back and forth?

A. Yes.

Q. Whether or not that requires attention on the part of any person; and, if so, who, to see where it is standing in that glass gauge?

117 A. The engine-driver.

Q. Taking a wild engine that is not upon the time-table, what does that engine meet, and what are its difficulties over an ordinary engine that is run by time-table?

A. That depends upon what kind of a signal is carried forward, and the regulations for its orders, verbal, written, or printed.

Q. Suppose there was no verbal order, excepting that the engine is to keep out of the way. Tell me what a special engine has to encounter; whether there are or not more people crossing the track than there would be at the time of regular trains?

A. They are to keep out of the way of all regular trains in case they have a white signal, just according to their orders.

Q. If there are other orders, how do those orders come?

A. I do not know how they come now. I am not acquainted with their orders now.

Q. Ordinarily on railroads?

A. I think their regulations come from the superintendent, through the train dispatcher.

Q. By telegraph?

A. Verbal or written.

Q. If there was a change of orders after the engine has started
118 from the depot from Portland, if that is the starting point, while it is on the road, how do those orders ordinarily come, by telegraph?

A. Yes; usually.

Q. How does an engineer regulate the speed of his engine?

A. By opening the throttle and by his reverse lever.

Q. Beside regulating the speed, what else does he have to watch?

A. He has to keep a good lookout on the track to see that everything is all right; lookout for broken rails, for any obstruction across the road

Q. Whether or not track repairers are frequently repairing the road?

A. Yes; they are on the road repairing.

Q. At crossings, what is he to look out for?

A. To see that the crossings are all clear.

Q. Where trains are run by time-table, as to those trains, whether or not the time is usually uniform for a considerable length of time. If a train is due at a station at a certain time, whether the public are informed and notified of that?

A. As a rule the time-tables are expected to belong to the employees alone. I believe that is one of the rules and regulations.

119 Q. Are they not posted up at offices along the line of the road—the time they leave?

A. Sometimes their time-tables are put up in stations.

Q. Is not notice published in the newspaper?

A. Yes; the time of starting from the terminus of passenger trains, not freight trains.

Q. In running a wild engine, what kind of an engineer does it require as to experience?

A. In my opinion, it would be a man that understood well the working of an engine, and understood the regulations well, a man of experience. He has got to look out for all trains, if he is running on that order. If other trains are to wait for him, he knows where he is going to cross.

Q. Are there any other duties to perform, such as obtaining clearance orders?

A. I do not know about that. I never had anything to do with clearance orders. I understand there is such a regulation as that, but I never had anything to do with it.

Q. Besides running the engine, manipulating the engine, whether or not if there was no third person on the train, the engineer would have other duties to perform besides running the engine, watching the track, at the different stations that are passed?

120 A. He would, of course, have to look out, according to the orders he was running under, either verbal, special, or regular. There are rules laid down on most roads for special trains to run under.

Q. Who, ordinarily, does that business?

A. On a great many roads the superintendent. I always did that myself.

Q. On the road, I mean, upon an ordinary train, where there are cars attached to the engine, not a wild engine, who, ordinarily, attends to the duty of going to the station and looking after all matters, seeing whether the road is clear and clearance orders, if there are any?

A. The conductor. The conductor, when in charge, always gives direction when to start. Of course, the engine-driver knows where to stop.

Q. Who, in ordinary cases, looks out and sees when it is proper, and gives the signal to start?

A. The conductor.

Q. When a train is going out, and a special engine wants to go to the same place, is there any difficulty in coupling the two engines together and running them out with the train and with the conductor?

121 A. I always consider it better to run them separate. I do not like to run two engines together. I never consider it advisable to put two engines together, unless necessary.

Q. You state you run them separate. How many men did you send out upon them?

(Objected to.)

COURT. The customs of various roads, including this road, are admissible, I think,

Q. State, as matter of fact, during the time you run upon this road, when you sent out a wild engine, what was your practice as to the number of men you sent out?

Mr. RAND. I desire to have my objection noted.

COURT. The usage of this road—not of this man in particular—fifteen years ago, I think admissible, and do admit the usage of the road, so far as you know at that time.

A. As a rule, we sent three men on an engine. At that time I never heard the name of "wild engine." That is a recent name.

Q. I mean an engine that goes out alone, without cars; a single engine and tender.

A. Yes.

COURT. The usage of the road?

122 WITNESS. When I had charge, as a rule, I sent three men.

Q. Was that the rule of the road, so far as you know, when you had charge of it?

A. So far as I had charge of it.

Q. Who were those three men?

A. Engine-driver and fireman, and some other person who was well versed in the rules and regulations—understood them.

Cross-examination:

Q. What is the difference between the duties of an engine-driver of a passenger train and the engine-driver of an empty engine; what is the difference between the duties they would have to perform?

A. It is supposed that most everybody knows when a regular train is coming, and they do not always know when a special train is coming. They both of them have to look out the same. So far as the handling of the engine, the working of it is concerned, their duties would be just the same.

Q. So far as looking for the crossings, they would be the same?

A. Yes.

Q. So far as ringing the bell or blowing the whistle, they would be the same?

A. Yes.

123 Q. The engine-driver of a train does not have anything to do with starting the train?

A. No.

Q. The conductor signals him when?

A. Yes.

Q. Is there any difference between the duties of the two positions, excepting that in the case of the driver of an empty engine, he has to determine the time of starting?

A. Yes [no]; if he is in charge alone.

Q. That is the only difference?

A. That is all.

Q. I understood you to say you did not know anything about the rules of the defendant corporation since you left the road, or in reference to its details?

A. I believe I said I did not know anything about these clearance orders. I never used clearance orders. I have not had any practical knowledge since I left the road of the working of the present rules. I was connected with the road before it commenced running, and run the first train as conductor. I began on the road in 1847.

Q. During that period, from 1847 to 1863, it was a rule on this
124 road to send three men on an empty engine, you say. Was that a printed rule?

A. I said, as a rule, I sent three men.

Q. I did not understand that to be the question which the court authorized you to answer.

A. I meant to answer it.

COURT. The question put to him was what the usage on the road was when he was connected with it, and he said, so far as he had anything to do with it, it was to send three men.

WITNESS. I meant to say, between Island Pond and Portland. I had entire charge, and made regulations. I had printed rules sometimes.

Q. Was that a printed rule?

A. No. There was one question I did not quite understand at first, and would like to explain. The engine-driver of a special train alone has to act as conductor and engine-driver both; but when he is with a train the conductor has charge.

Q. I understood you to say before, that when he run an empty engine he had to perform the duty of determining when to start his engine, perform the duties of conductor in reference to that. There are no other duties that a conductor of an empty engine would have to perform?

A. To look out for the road, go according to orders.

125 Q. There are no tickets to take up?

A. No.

Direct resumed:

Q. Mr. Rand asked you as to any difference between running an empty engine and running an engine with a passenger train that was run by rules, and you said something about the fact that where the train run by rules, the public knew of the regular passage of trains?

A. Yes.

Q. What else have you to say?

A. We always consider there is more risk in running a special train than a regular train.

Q. Runs against the whole road—all the trains on the road?

A. Yes.

Q. Dodges in and out to get to stations?

A. Yes. In all special trains there are two ways to run them; one is

to keep out of the way of all trains; the other is to have certain crossings fixed for them to cross.

Q. When they were to keep out of the way of all trains, who looked out for that on a special engine, when you sent them out?

126 A. When there was a conductor an engine-driver both, the conductor was responsible for the train, the same as he would be for a regular train.

Cross resumed:

Q. You were speaking that there was more danger in running an empty engine. Is that because it is not on the time-table?

A. Yes.

Q. Would it be any more dangerous to run an empty engine, which is not on the time-table, than it would be to run a special train that was not on the time-table?

A. No. In picking out the third man it would not always be a conductor; sometimes I sent a baggage-master, and sometimes I sent an extra engine-driver who understood the rules.

Q. What is the object of the third man?

A. A good many.

Q. Your object in sending them?

A. Because I considered there was greater safety in sending three men than two.

Q. Why did you not send four?

A. I did not think it was necessary.

Q. Wouldn't it have been safer to send four?

A. It might and might not.

127 Q. Did you instruct the third man as to the duties he was to perform on the engine?

A. Yes.

Q. What were his duties?

A. To follow his regulations. He always had them with him.

Q. Take an engine-driver who is perfectly acquainted with the rules and time-table, understands them all, and has them with him, what advantage is the third man to him in the performance of his duties?

A. Because it is greater safety to have a third man.

Q. What advantage, what assistance is this third man to the engine-driver who has all this knowledge?

A. Because the instructions are directed to the conductor and engine-driver, and they have printed or written or telegraphic orders to run, and they are sent to the conductor.

Q. Assuming that the engine-driver understands fully all the rules on the time-table, and the time-table itself, what assistance to him in running his engine and making his crossings is this third man? In what particular does he assist him?

A. Engine-driver may forget.

128 Q. That is the object?

A. Yes.

Q. The object is to prevent the engine-driver forgetting something?

A. Forgetting his special orders.

Q. What is there to protect other people against the third man forgetting it?

A. I think there is more safety in three than in two.

Direct resumed:

Q. Are or not the duties of an engine-driver and a conductor distinct and different?

A. Yes.

Q. In running a special train, are not the orders and rules addressed to both conductor and engine-driver?

A. Yes.

Q. You were asked why you sent out more than two men, and you said you thought it was necessary. Explain why it is necessary, and exactly why you sent them out on an empty engine?

COURT. He has answered. First, he said two might forget. Then he said three would remember better. If you have anything to add to that you can do so.

129 WITNESS. I do not know as I have anything special to say. I will say I know that two men have forgotten.

Q. You say you consider the three necessary?

A. Yes.

Cross resumed:

Q. What is your business at present?

A. I am superintendent of the Rumford Falls and Buckfield Railroad, which runs from Mechanic Falls to Canton—the old Buckfield branch. We sometimes run empty engines on that. That road is twenty-seven and a half miles long, and is in full operation. That road commenced running last July.

GEORGE H. SAVILLE, called by plaintiff, testified:

Residence, Portland; my age is fifty-nine years; my business has been railroading since 1842 or '3—somewhere in that neighborhood. I was on an engine till 1869, I believe, most of the time. I was in the locomotive shop two or three summers.

Q. On what roads?

A. On the Boston and Maine; on this end between Boston and here—not on the extension. I never was on the Grand Trunk. I have been mostly on Boston and Maine. I was out at Taunton one summer.

130 Then I was on the road that led from the Boston and Maine and went up the lake; was there one year; then I came here.

Q. During all that time you have been engaged in running an engine?

A. Not all the time; I was off one or two summers in the shop.

Q. Have you run an engine on special trains—and empty engines?

A. I have twice or three times; I think that was all; that was since I have been down here; that was caused by going up with my train, then turning around and taking an extra down, and then have to go up and pull my train at night; that made a special for me going up.

Q. State what the duties of an engine-driver are. What he has to perform in running an engine.

A. Pulling the train; it is his duty I suppose in the first place to look after the track, see it is clear; his next duty is to watch his steam, see it is the right height, and, if it is not, to see what the cause is—whether the fire or fireman, or what; then look after the water and see it is right

height; then to listen to the sound of the engine and see that she
131 is running smooth and still—no different movement than is usual, no skip or noise; see that she is in a proper condition. If anything happens there is an unusual noise.

Q. Indicated by the noise?

A. Yes.

Q. State what the duties of a fireman are on such an engine.

A. His duty is to keep the steam as near to the proper height as possible, knowing what her height is—100 or 110 or 130; attend to the fire regularly and carefully, and keep the steam as near still at one point as possible, and ring the bell at crossings.

Q. Have you stated now all the duties of an engineer and fireman on an engine?

A. While pulling the train, I believe I have.

Q. In running an empty engine, are there not other duties that must necessarily be performed by some one?

A. A wild engine?

Q. Yes.

A. They have no other duties to perform if they put a man on there to keep the time, as they should; and his duties are the same.

132 Mr. RAND. That was not the question.

Q. You have spoken of what the duties of an engine-driver and fireman are. Now, in order to run an empty engine without a train to it, over a railroad where there are trains to be met and passed and to be looked out for, whether or not there are not necessarily other duties to be performed than those you have named by some one?

A. Most certainly there are.

Q. State to what class of officers or employees those other duties appropriately belong.

A. They belong to a conductor.

Q. State whether there is anything in the duties performed by an engine-driver which would tend to familiarize him with those other duties which you say belong to a conductor. Whether he would acquire them by being engine-driver; and, if so, how?

A. It would be acquired by long experience; I do not know of any other way—and practice.

Q. Long experience and practice?

A. Yes.

133 Q. Alone, or in connection with another man?

A. In connection with a conductor.

Q. Could they be acquired in any other way?

A. I do not know of any other way; it must be done by practice, I think.

Q. State what those other duties are, which you say are to be discharged by a conductor.

A. Keeping his proper time going over the road; I know of no other.

Q. How is it in regard to looking out for meeting other trains?

COURT. That is what he means, as I understand. Is that what you mean?

A. Yes; in regard to the time.

Q. State what would be required of a person in running an extra train, as to experience.

(Objected to.)

COURT. I think that is pretty nearly the question that has been so much discussed. It is no question for an expert, whether a young man is likely to be careful.

Q. State how the knowledge and qualities requisite to enable a man to take charge and run a wild engine over a railroad, when there are
134 other trains to be met and passed, is to be acquired.

(Objected to.)

COURT. I do not think that is a question for an expert.

Q. State whether or not you have run on the Boston and Maine, and how recently.

A. I have not run on the Boston and Maine, for a good many years. I have been at this end. I never run on the B. & M. extension that runs in here. I run from Boston to Berwick. Before they built in here I came down and run from here to Portsmouth, and have been here since.

Q. Where have you run since you came here?

A. Between here and Portsmouth; on the P. S. & P.

Q. Any other road?

A. No; the P. S. & P. belongs to the Eastern; is under their control.

Q. Do you know what the custom upon that road was, prior to 1875?

A. I do not in regard to special trains.

Q. In regard to sending out extra engines?

COURT. What the usage or custom was before 1875?

A. In regard to getting a light engine over the road?

134½ Q. Yes.

A. The most of the time they would couple it into a train, and when they did not they would send it light; when the train was going anywhere near the time they wanted to send it, they would couple it into a freight train and send out what they call a "double-header;" when they could not do that they would send it light.

Q. When they send it light, how many men were sent with it?

A. I cannot tell, for I was not on the engine then, and do not know how many they did have. I think I know what the duties of a locomotive foreman are. His duties are to keep the engines in proper running condition and order, and in order to do that he wants to be well qualified in regard to locomotives. On some roads the foreman has charge of the men till they are out of the yard; on some others he does not have charge of them after they get on their engine; then they come under the head of station masters. On our road when he was out of the yard he was
135 out of the master mechanics jurisdiction.

Q. Whether or not he has the making up and sending out of the engines and manning them?

A. No, he does not; he used to supply the engines with whatever they required; nothing further than that, so far as making up is concerned, where I am acquainted. I am perfectly acquainted with Joseph N. Martin; have been acquainted with him, I should think, fifteen years.

Q. State what his temperament is as to being cool or excitable, or clear-headed, or apt to be confused.

(Objected to.)

COURT. I do not see what possible bearing it can have on this case.

Cross waived.

EDWARD P. PHILBROOK, called by plaintiff, testified:

Residence, Albany, Maine. In 1875 I was in the employ of the Grand Trunk.

Q. How long had you been in its employ?

A. About six years, I believe. I left it in 1876.

Q. In what capacity did you run the last three years before you left?

A. I was running a locomotive—was a locomotive engineer. Before that I had been fireman.

136 Q. Have you ever run an empty engine?

A. Yes. I cannot say whether I ever run one while I was fireman; do not recollect whether I did or not. When I was running as an engineer I knew of this rule in relation to clearance orders that has been read.

Q. State, prior to 1875, what the observance of that rule was on the part of those in charge of different trains on that road. Was it observed or was it not?

A. Stop to get clearances?

Q. Yes.

A. Sometimes they would and sometimes they did not.

Q. What proportion of the times did they not stop at the different stations where the orders were ready?

A. I think I run by about one-third part of the time.

Q. After this accident or injury, whether or not that rule was enforced?

A. It was soon after.

Q. Whether or not that matter of running by was general, so far as your knowledge; that is, going sometimes after them and sometimes not, as you have stated?

A. Yes.

137 Q. Was there any notice taken of it by officials of the road, so far as your knowledge extends?

A. I never heard of it. I know Charles D. Noyes. I cannot say exactly how long I have known him. I knew him when he came on to the road, and knew him from that time till he was discharged from the road. When he was at Gorham I was with him some, and sometimes in Portland, as it happened. I happened in here sometimes when he was here. I do not know certainly what his age was at the time of the accident. I supposed he was about twenty; that is what I calculated.

Q. What was his grade and rank in the service of the company?

A. He was fireman, so far as I know.

Q. Did you ever know of his being raised to the grade of engineer, excepting temporarily to take some one's place?

A. That is all. I never knew of his having any experience in

138 running a *a* wild engine.

Q. Did you ever know of his having any experience in the duties of conductor or any of the duties required in running a wild engine, excepting the mere handling of the engine?

A. That is all.

Q. State what different duties are required in running a wild engine against the road and in running an engine with time-table and conductor.

A. A man running a wild engine would have to look out for his orders;

he would have the duties of conductor as well as his own duties of engine-driver.

Q. Whether or not there are other matters, other obstacles to encounter in running a wild engine over the road that you would not encounter in running an ordinary engine, run by time-table, as to section, men, and people crossing, and other matters?

139 A. He would have to look out the same ahead running a wild engine as he would one attached to a train; take care of his engine the same.

Q. Are there or not more likely to be on the road more obstacles that he would encounter with a wild engine than though he was on a train running by time-table?

A. Yes.

Q. In running as an engineer, what is the advantage of running upon an engine a considerable time?

A. The longer he runs, I should calculate, the better man he would be.

Q. He would have more self-possession?

A. Yes.

Q. When you were running, was there a slip or anything that the conductors were required to sign at the different telegraph stations prior to 1875?

A. I cannot say, before that.

Q. Wasn't there a book, called a clearance book, that they had to sign?

A. Yes, there was a book, I think.

Q. Clearance book?

140 A. Yes.

Q. Do you know where that was sent at the end of each month?

A. I suppose it was sent to Island Pond.

Q. (Mr. RAND.) If you know, give us an answer.

WITNESS. I do not know.

Cross-examination:

Q. When you speak of trains sometimes clearing and sometimes not, what does that "sometimes not" mean? Does it mean that they run by the station, or what?

A. Sometimes they stopped and got a clearance order, and sometimes they did not.

Q. What do you mean by "they did not;" that they run by the station without stopping?

A. Yes.

Q. Did you ever do it?

A. Yes.

Q. Went by without stopping at all?

A. Yes.

Q. I understood you to say that an empty engine would encounter more obstacles in going over the road than a train; explain how that can be, provided they were going over the same road and in the same direction.

141 A. Track repairers, if this special engine had not been signalled,

would not know anything about that they were coming; they might have a car on the rails; that is one thing.

Q. Was it or not the practice on the road and the rule of the road whenever specials were run, that the preceding train should carry a signal?

A. Yes.

Q. Wouldn't that notify the track repairers?

A. Yes.

Q. Notify all the men along?

A. Yes; that is what it was carried for.

Q. A white signal and a red signal indicating different things?

A. Yes.

Q. Would there be any other obstacles?

A. There might be a team of some kind on the crossing.

Q. Might there not be the same thing in relation to regular trains?

A. Yes; they have found cars on the track when they have been signalled.

Q. I want to know if there are any more obstacles; whether you mean that a wild engine that is flagged has any more obstacles to en-

142 counter in going along the rails?

A. I think they do, because this regular train is supposed to run just such a time. If a white signal has been carried, that special train has a right to go any time in the day. It follows a train that carries a signal, and it is liable to be from one to six hours behind; it has a right to go any time during the day.

Q. Wouldn't all the intermediate engines or trains carry the same signal?

A. They made that a practice, I believe; sometimes they did not.

Q. Supposing a train leaves here at seven o'clock in the morning for Gorham and carries a white signal, indicating that a special of some kind is going to follow; now, suppose that special does not leave till ten that forenoon, and in the mean time another passenger train leaves Portland at nine o'clock that forenoon, wouldn't that nine o'clock passenger train carry another white signal?

A. They would if they had orders to.

Q. Wasn't it the rule?

A. Yes; it was the practice.

143 Q. Wasn't it the custom?

A. Yes; the most of the time, I believe.

Q. Wasn't it always the custom?

A. I couldn't say.

Q. Do you really know anything about it?

A. Yes; I have seen it done that way. Carried on two trains.

Q. You said it is a notice that a special engine or train is coming some time during the day. Why do you limit it to that day?

A. It has that right on a white signal.

Q. Why hasn't it the right the next day?

A. That is another date.

Q. If it has not come along, and has been signalled as coming, wouldn't they be bound to look for it?

A. They would have to get other orders and start anew another day.

Q. Was it the custom on this road, or any road you knew of, to flag a special in the morning, and not have that special go out till the latter part of the afternoon, and three or four or six trains between?

A. Sometimes there would be a construction train out, and get a white signal carried, and they might not follow for three or four hours.

144 Q. Have you ever known of an instance or a custom to flag in the morning a special train, and of that's not going out till late in the afternoon?

A. I cannot say.

Direct resumed:

Q. You have been asked about running by stations and not getting orders. Were they stations where, when you did get clearance orders, you got them at those same stations?

A. Yes.

Q. And where they were given out and required?

A. Yes.

Q. Hav'n't you stopped at stations where there were no clearance orders obtained by conductors; where they came off without them?

A. I have stopped where I have not received them.

Q. Where they have not been read to you?

A. Yes. I did not see them.

Cross-resumed:

Q. Was that when you were engine-driver?

A. Yes.

Q. Was that your business when you were engine-driver?

A. Yes.

145 Q. Was it your business when you were engine-driver to go after clearance orders?

A. No; it was the business of the conductor.

Direct resumed:

Q. Were they not read to you? Wasn't there a rule and practice to read those?

A. To bring one to the engineer.

Q. That was done in the presence of the fireman?

A. Yes, generally.

Q. So that he knew when you received them, and when you did not?

A. Generally.

SAMUEL G. SWEETSIR, called by p'l'f, testified:

Residence, South Paris. I was formerly in the employ of the Grand Trunk; I was locomotive engineer; I was first brakeman, next fireman, next engineer.

Q. Through what grades does a conductor pass, if you know, on that road, before he becomes conductor, and how many years, ordinarily?

A. Generally brakeman first, then conductor.

Q. Baggage master or in the baggage car?

A. Yes.

Q. Then conductor?

146 A. Yes. Prior to 1875 I was engineer on the road about four years; I knew Noyes when he came on to the railroad; do not

think I knew him before that; I cannot say what his age was; I think I am acquainted with the duties, and what is necessary to enable a person to perform them, of a driver of a locomotive engine and of a wild engine; I have run a wild engine myself; I am acquainted with Noyes. In 1875, at the time of this accident, I was running between Portland and Gorham, N. H., the same places that Noyes was.

Q. What was Noyes' grade in the employment of the company?

A. Fireman.

Q. And was so at the time of the accident?

A. I knew him to be nothing else at the time. He has fired for me.

Q. What experience had he had before the time of the accident, in the duties of engineer?

A. Nothing more than handling an engine around the yard, taking her out of the house, etc.

Q. From that he was put temporarily on to this passenger train with a conductor?

A. Yes, and was there up to the time of the collision; I say I am well acquainted with Noyes, and acquainted with his qualifications.

147 I think I am acquainted with the duties, what is necessary to enable a man to safely and prudently run a locomotive engine, and a wild engine on that route.

Q. State whether or not Noyes, at the time of the accident, was qualified to run a wild engine with only a fireman, without a conductor, from Portland to Gorham.

(Objected to.)

COURT. I rule this out.

Q. Whether or not he was competent on that day to perform the duties necessary to be done in running a wild engine?

(Objected to.)

COURT. I rule it out.

COURT. So far as his qualifications as an engineer are concerned they are not ruled out.

Mr. STROUT. I offer to prove by this witness that it requires, or did require on that day, in order to run a wild engine from Portland to Gorham, an engineer of age and experience, who not only knew the rules of the road, but who was familiar with the manipulation of the engine, and who had long experience, so as to give him self-possession, and make him a first-class engineer, and a familiarity that rendered him thoughtful.

COURT. That is not a question for an expert.

148 Mr. STROUT. The next question I proposed to ask was whether or not Noyes, whom he was acquainted with, possessed those qualifications?

COURT. You can show what qualifications Noyes had, and what he was deficient in, but not the witness's opinion on the case generally.

Q. State in what Noyes was deficient, if you know, to run a wild engien.

A. I do not think he had had the experience required for running a wild engine or special train.

Q. Whether or not such experience is necessary in order to give a person self-control?

A. Yes.

Q. Self-possession necessary to perform his duty properly, in running an engine?

A. Yes; I knew of the rule read here in relation to clearance orders.

Q. Whether or not prior to 1875 that was observed, or required to be observed, by the road, and to what extent?

(Form of question objected to.)

Q. I will ask what was the fact; what was the degree of observance; how was it observed?

A. I do not think that it was generally observed.

149 Q. When a conductor took a clearance order did he also take one for the engineer?

A. I cannot say as to that. I do not remember of his ever bringing one to me.

Cross-examination:

I do not know anything about these clearance orders or the practice under them, excepting in reference to my own train. I was never conductor.

Q. It was not your duty as engine-driver to get the clearance orders?

A. When I run a wild engine it was. When I was engine-driver of a passenger train or freight train I had nothing to do with getting clearance orders. I left the road in 1875.

Q. Were you dismissed?

A. Yes.

Q. For what cause?

A. I do not know.

Q. You don't know?

A. No.

Q. Perhaps I can refresh your recollection; were you ever at my office?

A. Yes.

Q. Can't you now tell what you were dismissed for?

150 A. I was accused of taking composition.

Q. I do not ask you whether you were guilty or not. You were accused of stealing?

A. Yes.

Direct resumed:

Q. You were accused of that by Mr. Rand?

A. Yes.

Q. Was it true?

A. No.

Cross resumed:

Q. Whom did you come to my office with; did you mean to say I charged you with stealing?

A. No, sir.

Q. Who did charge you with stealing?

A. It was talked around the concern; that is all I know about it.

ALBERT G. SAWYER, called by pl'f, testified:

I have been in the railroad business. I have been employed on the Portland & Rochester and on the Lake Shore & Michigan Southern. The Lake Shore & Michigan Southern is a large road, five hundred and thirty-five miles of main line, nearly twelve hundred miles in the

151 whole road, branches and all. While there I acted in the capacity of engineer.

Q. Had you occasion to see spare or empty engines sent over the road back and forth?

A. Yes. I left there eight years ago. I was employed on that road three years.

Q. State what the practice on that road was as to sending out a spare engine; with what number of men?

A. They used to send the caboose and conductor and crew, two brakemen, if they went, and if they had four four went.

Q. Was it the practice or usage to send out an engine with only an engineer and fireman?

A. I never saw one there sent out so. Mr. Lunt is now superintendent of the Portland and Rochester. He used to be on the Indiana Central.

Q. What is the usual practice on the Portland & Rochester in sending out an extra engine unless on an extraordinary occasion?

A. I always had a man with me when I run an extra engine there, another man besides a fireman.

Q. You attended to the engine?

A. I did.

152 Q. Had you any time for anything else, if you properly did your duty there?

A. No; not when I was running.

Q. What did the third man do; what was his business?

A. He looked after the time and the meeting points, if he was on a wild train.

Q. The meeting of other trains?

A. Yes.

Q. State what difficulties there are in running a wild engine that are not found in running an ordinary train on a time-table getting it over the road safely.

A. You have more to look out for; you have to keep clear of all trains on all the roads I have run on. If you have a regular train you have a time-table to run it by, and the meeting points are all marked, so you know where they are.

Cross-examination:

Q. On the Lake Shore & Michigan Southern if they had occasion to send an empty engine merely from one point to another, not to do any work excepting to go a certain distance over the road, do you say they put on three or four men?

153 A. I never saw them send an engine in that way. You ask me an empty engine?

Q. I thought the plaintiff's counsel asked you an empty engine?

A. He asked me an extra, and I said they always sent a caboose and a conductor and his crew.

Q. I understood you to say that on that road you never knew them to send a mere engine and tender from one point to another?

A. I said that. That is what I call an empty engine.

Q. If you never knew of one being sent you never run one?

A. No; I have run one with a caboose attached; I never run an empty one in that way.

Q. You were asked about some of the difficulties in running an empty

engine, for the engine-driver, over and above the difficulties of running a passenger train. I think you said he had to make his crossings, and that the time-table would instruct the driver of a passenger train just where the crossings were to be made. Wouldn't the driver of a special, if he had the time-table, know where the trains were to be met?

154 A. Yes; but his extra train would not be on the time-table; I should suppose he would know where the regular trains were to be met.

Q. Those would be the crossings he would make if he was running an empty engine.

A. I do not see it so.

Q. I understood you to say, in answer to a question put to you by plaintiff's counsel, that one of the difficulties in running what we supposed you meant as an empty engine, but whatever you call it, that he had to make his crossings, and that the driver of a passenger train would have an advantage over the driver of an extra, in that the driver of a passenger train would know by the time-table where the other trains were to be met.

A. Yes.

Q. That was what you said?

A. I did not say it the way you put the question.

Q. Does not the driver of an empty engine or special train, if he has the time-table, know just where the other trains are, or where they ought to be?

155 A. He is supposed to know where they meet if he can read. All the time-tables I ever run by the meeting points were marked so any man could read them.

Q. He would have the same information on that point that a driver of a regular passenger train would have?

A. He would know where the passenger trains met.

Q. Wouldn't he know where he would meet any regular train?

A. No; because his extra train is not on the time card.

Q. Here is a time-table; if an engine-driver has that with him doesn't he know just exactly where he is to meet a regular train?

A. I should suppose a man, if he had one of those time cards, would know where that regular train would meet another train and pass, but that wouldn't help him any on an extra engine.

Q. There is a train that leaves Portland, according to this time-

156 table, at seven in the morning, and goes through on these figures to Gorham; supposing a man with an empty engine leaves Gorham at nine o'clock of the same morning, and comes down the road, won't he know from that time-table just where No. 4 is on that, at any particular time?

A. He will know where it is due.

Q. Then he would have the means of knowing where any trains were, or where they were due, that he was likely to meet?

A. He would know all the trains that were on the time-card if he could read it.

Direct resumed.

Q. Is it not frequently the case that trains are sent in the opposite direction, that are special trains, not on the time-card?

A. Yes.

Q. Is it not frequently the case that trains break down or accidents happen, so they do not make exactly the time on the time-card?
A. Yes.

CHARLES A. GOWELL called by pl'f, testified:

157 Residence, Granville, Mass. I consider my business farming at present. I was in the employ of the Grand Trunk from October 3, 1870, to the latter part of April, 1875—I should have said from May 1870, I first commenced with the company. When I spoke first I was referring to the time I went on to the train. I commenced first building fence for the Grand Trunk. In October I commenced braking for a freight train, continued at that about three years, if I recollect, and then went on to a baggage car, was there about a year, then freight conductor.
Q. Then from that what?
A. From that home again.
Q. Whether or not you passed through the usual grades that are required by the Grand Trunk to fit a man for conductor?
A. I suppose I did, according to the practice.
Q. About what length of time does it take for a man to go through on the Grand Trunk to learn the duties and become conductor?
A. It depends upon the man. Some men might be there all
158 their lives, and not be one, and others be there three or four years and become one.
Q. What is the average time, an ordinarily intelligent man?
A. Perhaps three to five years.
Q. That is the way you familiarized yourself with the business, by actual practice and experience?
A. That is the best way to become acquainted with the business.
Q. I call your attention, prior to March, 1875, to the clearance orders. You know the rule about obtaining clearance orders at all stations and crossings?
A. Yes.
Q. The rule I refer to you know?
A. Yes.
Q. State, while you were there as conductor, how that rule was observed, what the observance of it was?
A. Sometimes if they had plenty of time, they would give clearance orders. If anything happened they might be late, and thought it was not necessary to stop, they would pass right along.
159 Q. That was at the stations where these clearance orders were required?
A. Yes.
Q. Whether or not it was on trains where they were required?
A. Yes.
Q. Was there any fault found or complaint made by the officers of the company on account of that neglect?
A. Not to me. I ran between Portland and Gorham mostly; sometimes between Island Pond and Gorham, and on one or two occasions between Portland and Lewiston.
Q. But between Portland and Gorham was that rule required by the road—by the officers of the road; was it strictly enforced?

A. There was an order in the conductor's book to that effect.

Q. Was it or not observed, as matter of fact?

A. About an even chance. Some of the more cautious were little particular. Others not quite so afraid of the job, perhaps did not
160 take quite so much pains. I knew Noyes. I do not think he had any experience with the duties of conductor. I never saw him brake or act as conductor on a train. I never saw him doing anything where he would learn the duties of conductor.

Cross-examination:

Q. Did you know anything particular about Noyes; about his occupation, etc., on the road?

A. While I was on the road he was fireman. From the time I first became acquainted with him he was firing till the time I left the road. I think I have run on the train with him on one or two occasions where he was firing on freight train, but not very much. That was some time in the course of 1874, perhaps the latter part.

Q. I understood you to say that sometimes they stopped for clearance orders, and sometimes if they were late they went right by. Do you mean to say that with reference to any train excepting your own?

A. I crossed trains where they would pass right along in that way.

161 Q. Pass them on the road?

A. Pass them out on the road. If I was going towards Gorham, and they were coming on, I might be on a siding waiting for them to go past. Sometimes they are considerable late, and would go right along without stopping; as we term it, skim right along.

Q. Do you recollect of any particular conductor of any train who did that to your knowledge?

A. I might not actually remember the name now of the particular man who did it.

Q. How many instances of that kind do you think you ever saw?

A. I might have seen a half a dozen, or a hundred, or fifty, or one or two. I never took any note of them.

Q. There is some difference between one or two and a hundred.

A. In three or four or five years you would see a great many things you would not take notice of at the time, and might forget it in five or six years.

162 Q. Did you know any of those persons running by stations in that way were violating any rule?

A. Yes; I must know it if I had seen it in the book.

Q. Did you know it?

A. Yes.

Q. Did you inform any officer of the company of such violation of the rule?

A. We were not apt to do it in those times. I do not think I did.

Q. When did you leave the company?

A. The last of April, 1875, I think.

Q. Were you dismissed?

A. Yes.

Q. For what cause?

A. At my own request.

Q. Were you not dismissed for intemperance?

A. No; I was not. The sheet of that month will tell you.
Q. I didn't hunt up anything of that kind.
A. I will give you a chance.
Q. I thought I had seen you before?
A. I think likely. I do not remember of seeing you before to
163 speak to you. You are the first man that ever intimated that to me.
Q. I never intimated it to you.
A. Some one must have intimated it to you or you would not have thought of it; but I should like to see the color of the man that would say that I was.

Direct resumed:

Q. Was there a clearance sheet or paper that the conductor signed when he took those clearance orders at the office?
A. There was a book for them to sign, called the train clearance book.
Q. Where did that go at the end of each month?
A. I do not know that it went anywhere. I have no knowledge of its going anywhere—whether it remained there, or whether it was sent away at the end of the month.

FRANK H. SHACKLY, called by pl'f, testified:

Residence, Portland; I am yard master of the Portland and Ogdensburg Railroad; I have been engaged in railroading since 1869; I
164 commenced on the Grand Trunk.
Q. State what your business has been in connection with railroads since 1869 on the Grand Trunk and elsewhere?
A. Firing, driving, and braking, and I have, on a few occasions, run a train as conductor.
Q. When did you leave the Grand Trunk?
A. December 23, 1874; I was acquainted with Charles D. Noyes.
Q. Where were you at the time of the collision spoken of?
A. I was on the ground, about twenty feet from the train at the time of the collision; I was riding on the passenger train and jumped off.
Q. State what took place; what did Cummings do; what did you see and hear.
A. I saw Cummings pull the whistle; I saw him reverse his engine, and reach for the throt'le; that was the last I saw till I was on the ground, then I saw Cummings going in the air.
Q. What did he whistle?
A. Whistled once for the brakes.
Q. That means down brakes?
165 A. Yes.
Q. Pulling the throt'le?
A. Pulling the reverse lever over back gear.
Q. Where did you get onto this train?
A. At a number of different places; I was on and off at different places from Lewiston. I got on at Lewiston in the first place. I was on and off all the way along the road. I was from the baggage car to the engine.
Q. Where was Cummings and what was he doing when you jumped off of the train?

A. He was reaching for the throt'le.

Q. Reaching to reverse the engine?

A. He had reversed his engine, and was reaching for the throttle to open it so as to stop it.

Q. Had he turned around when you jumped off?

A. No.

Q. Was he or not in a position to see you?

A. No.

Q. What was the grade of Noyes on the railroad?

A. Fireman, as I knew him.

166 Q. You knew the rule when you were on the road relative to obtaining clearance orders?

A. There was a rule.

Q. State what the fact was as to the observance of that rule by conductors and others having charge of trains, prior to March, 1875.

A. Part of the time they received them and part of the time they did not; the greatest part of the time they did not receive them, the trains that I was on and some others, I know of.

Q. Was Noyes on the road at that time?

A. Yes.

Q. What was Noyes' age at that time?

A. About twenty.

Q. State what skill it requires to take charge and run a wild engine over the road.

(Objected to.)

COURT. I believe that is substantially the question passed upon.

Q. You knew Charles D. Noyes?

A. Yes; I lived in the same place with him before he went on to the railroad, and I knew him all the time after that. I had known him perhaps for fifteen years.

Q. State in what qualities, if any, Noyes was deficient to enable him to run a wild engine over the road at that time.

167 A. As far as handling the engine was concerned and carrying water and looking out for steam, I suppose he was qualified, but further than that I do not know anything about his qualifications; I never knew him to have any experience with anything else. My age is twenty-six. Noyes was called very nearly two years younger than I.

Cross-examination:

When I first knew him we were both very small, running round the streets to play.

Q. Were you on the engine at the time of the collision, or just before it?

A. Just before it, I was.

Q. Were you in the cab?

A. I was on the tender; I might have stepped into the cab a little ways.

Q. Were you on the coal?

A. I was, quite a number of times; I had to to go from the tender to the baggage-car; I got on and off the train at the stations; I got off the tender onto the baggage-car while it was running, and from the baggage-car on to the tender while it was running. I was not in the employ of the Grand Trunk at that time. I left on December the 23d, 1874, and this

was in 1875; I jumped from the tender; where you stand between the engine and tender is on the tender-frame, and that is where I jumped from.

168 Q. That was not on the coal?

A. No, the coal is swept back, away, and I was in front of the coal.

Q. How long before the collision did you jump?

A. I just had time to jump, and turn over twice, and get on to my feet; you can judge. I was on the Grand Trunk very nearly six years; I went on in the first commencement of 1869; it would make six years lacking two months and a half. I went on as fireman.

Q. How long did you serve as fireman?

A. Before I got any notice that I was to be engine-driver?

Q. Answer the question. How long did you serve as fireman? Was firing your first business?

A. Yes.

Q. I thought you said you were first breaking?

A. He asked me my occupations, and I said, braking, firing, and running an engine.

Q. In the spring of 1869, when you first went on to the Grand Trunk, what was your occupation?

A. Fireman; I fired from that time till 1874.

Q. To what time in 1874?

A. I was not promoted to regular driver till——

Q. Answer. To what time in 1874 did you work as fireman?

A. In the summer.

Q. What time did you serve as brakeman?

A. Since 1875.

169 Q. On what road?

A. Grand Trunk.

Q. I understood you left in December, 1874. Did you return?

A. Yes; I went on to the upper end, in Canada.

Q. At this end you served as firemen from the time you went on to the road to the summer of 1874; how long did you serve as engine-driver?

A. I did not serve after I was promoted as engine-driver, only from the summer to December.

Q. Who appointed you?

A. I had run trains a good many times, but I did not get any appointment till the summer.

Q. Then it was from this Mr. Martin?

A. Yes.

Q. You were running from here to Gorham?

A. Yes.

Q. What trains did you run on?

A. I run on different trains; I run on regular, and passenger, and freight.

Q. Run on any other?

A. I run on specials.

Q. Special passenger?

A. No.

Q. What do you mean by specials?

A. Wrecking trains and gravel trains.

Q. Ever run on any other kind?

170 A. Yes; have run on empty engine, what they call a wild engine; I used to run from Lewiston Junction to Danville Junction, and used to run from Lewiston Junction to So. Paris, on an empty engine, as engine-driver.

Q. Between the summer of 1874 and December 1874?

A. Yes.

Q. You speak of these clearance orders; that trains sometimes got them and sometimes they did not. What do you mean by "sometimes they did not?" Do you mean they did not stop?

A. They did not stop, and sometimes did stop and did not get them. Sometimes there was nobody there to give them.

Q. Do you speak of any trains excepting those you were running on?

A. Yes; trains I have crossed at stations, and trains I have been riding on when off duty.

Q. How did you know they did not get any clearance orders?

A. Because I happened to be around where I could see, and happened to be in the telegraph offices.

Q. What conductor can you mention who stopped at any station and failed to get a clearance order, and what time?

A. I do not know as I can remember dates, and cannot remember names.

Q. How many instances of that kind came under your observation?

171 A. I know of a good many.

Q. About how many?

A. I do not know as I could give you the instances of but a few, right out in particular. There were so many I did not take much notice of it. It occurred so often we did not notice it after a while. It got to be a common practice.

Q. With all trains?

A. Yes; all that I had any connection with, or saw on the road. I had a chance of seeing a good many, being on a wild train and wrecking trains.

Q. You were fireman all this time?

A. No.

Q. Excepting during the few months?

A. Those few months is what I more particularly refer to now; then is when I knew the most about it.

Q. Can you give me any instance in which this was done?

A. No, I cannot give you the name.

Q. Don't you recollect the name?

A. I can give you a name.

Q. Who was it?

A. William Blake.

Q. What was he?

A. Conductor.

Q. What train?

172 A. Freight train most of the time.

Q. When did this instance occur to the best of your recollection? Fix the time as near as you can.

A. While I was running.
Q. Do you mean while you were running as engine-driver?
A. Yes.
Q. Then it was between the summer of 1874 and December, 1874?
A. Yes.
Q. At what place?
A. I think there were two or three places.
Q. I understood you to say you knew that William Blake, conductor of a freight train, between the summer of 1874 and December, 1874, passed a station without obtaining a clearance order, or did not get a clearance order at the station. What was that station?
A. We passed West Paris station without a clearance order at one time.
Q. Confine yourself to the time between the summer of 1874 and December, 1874—this instance you have been speaking about. What station did he pass in that way?
A. I say he passed West Paris station.
Q. Where is William Blake?
A. I do not know. I guess he is not a great way from here.
173 Q. Is he in the employ of the Grand Trunk?
A. I cannot tell you.
Q. Where does he live?
A. He used to live, when I knew him, at South Paris. I do not know where he lives now. I never heard of his removing from So. Paris.
Q. Do you know between what points that freight train, of which you speak, was running?
A. From Gorham to Portland.
Q. A freight train?
A. Yes.
Q. Can you give me the name of any other conductor?
A. No; I guess I couldn't.
Q. Did you report this violation of the rule to any of the officers of the company?
A. No.
Q. Are you in the employ of the Grand Trunk?
A. No; I left them in December, the 23d, 1874.
Q. I thought you said afterwards you went to the other end of the line?
A. I was on the other end of the line about four months.
Q. When did you go to the other end of the line?
A. Somewhere about April or last of March.
Q. What year?
A. 1875.
Q. How long did you stay there?
A. About four months.
Q. Did you leave then finally?
174 A. I went from there to farming.
Q. You were brakeman on the other end of the line?
A. Yes.
Q. Where did you run?
A. Montreal to Island Pond, part of the time; then changed and went from Richmond to Island Pond.

Q. You left the company when?
A. The summer of 1875, from braking.
Q. Were you dismissed from this end of the road?
A. No.
Q. Were you dismissed from the other end of the road?
A. Yes.
Q. For what cause?
A. For running an engine without orders.
Q. Was that the cause?
A. Yes.
Q. How do you mean?
A. The engine-driver got off and left the fireman in charge, and the fireman got drunk, and I took the engine and run it from Coaticook to Island Pond.
Q. You were the only person there capable of running it?
A. Yes.
Q. Did you meet with any accident on the way?
A. No; I put the engine in the house at Island Pond, safe.
175 Q. For doing that work under those circumstances they dismissed you?
A. They said that was out of my line of business, and I had no right to touch an engine. That is the word I received from the train despatcher. The assistant superintendent was sick at the time.

Direct resumed:

I have run wild engines over the road. I never run one while I was fireman.
Q. Did anybody else, while they were firemen, run a wild engine, to your knowledge?
A. Not to my knowledge.
Q. In relation to obtaining clearance orders, was there any paper signed by the conductor?
A. Train clearance sheet, or clearance book.
Q. What was done with those sheets or books?
A. I was told by the operator that they were sent to Montreal.
Mr. RAND. If you know.
WITNESS. The orders were to send them to Montreal.
Mr. RAND. I move that be stricken out.
Q. How often were they sent?
A. Once a month.
COURT. That is hearsay.

JAMES BICKNELL, called by plaintiff, testified:

Residence, Empire Road; that is the name of a station in East
176 Poland, on the Grand Trunk. The next station this side is Lewiston Junction. I have been brakeman, baggage-master, and conductor on the Grand Trunk. I have worked for them some sixteen or seventeen years.
Q. Are you in their employ now?
A. I am summers.
Q. Were you on the road in 1874 and 1875?
A. I was.

Q. In what capacity?

A. Conductor on local freight in 1874 and 1875.

Q. Were you acquainted with this rule in reference to obtaining clearance orders?

A. Yes; I was supposed to be.

Q. While that was in existence, state what the fact was in reference to its observance prior to March 6, 1875.

Mr. RAND. This rule is dated on the time-table Sept. 20, 1874. I object to any testimony as to any breaking of the rule prior to the time they prove the rule to have been in existence.

Mr. STROUT. We have notified them to produce the rule.

COURT. I think you can show by parol evidence if defendants have nothing to produce in answer to your notice, that it was in fact a good deal earlier than that.

Mr. RAND. They have not proved notice (Mr. Rand examines
177 paper). On examination, I think the was sufficient.

Q. State how long you had known of the existence of that rule 7, as near as you can recollect.

A. I should think some four or five years before I left the road.

Q. When did you leave the road?

A. In 1876, December.

Q. State what the fact was relative to the observance of the rule.

A. We were quite careless about that—about getting the clearance orders.

Q. What is the fact, whether they got them or not?

A. Sometimes we got them, and sometimes we did not—were not very particular about it.

Q. When these orders were obtained, what did the conductor do as to signing papers, or anything of that kind?

A. I think he signed a book, his receipt for the clearance.

Q. Where was that book kept?

A. In the telegraph office.

Q. Do you know what was done with it?

A. No.

Q. Do you know, as matter of fact, whether the superintendent of the road made rounds on the road and examined these books at the different stations?

178 A. No.

Q. State the grades that a person goes through upon the Grand Trunk before he arrives at the position of conductor.

A. Brakeman and baggage-master most always; sometimes he is not baggage-master.

Q. Whether or not you have been in the court-room and heard the tesmony relative to the duties of a locomotive engine-driver and fireman?

A. Yes.

Q. Are they such as would educate a man for the duties of conductor?

A. It would in some things.

Q. You do not answer the question fully. What is the fact about their qualifying them to be conductor?

A. An engine-driver is supposed to know as much as the conductor about his running.

Q. In regard to the meeting of trains and passing trains and looking out for the time of trains, what is the fact about that?

A. He should know where all his crossings are.

Q. Whose particular duty is it to look out for those matters?

A. The conductor's.

Q. Did you know Charles D. Noyes in 1875, March, and prior?

A. I knew him by being on the road; I was not personally acquainted.

Q. What was his grade on the road?

179 A. I do not know. As far as I know, he was fireman.

Cross-examination:

Q. You say sometimes they got these clearance orders, and sometimes they did not. Under what circumstances didn't they get them?

A. Sometimes they passed a station without stopping, and sometimes they stopped at a station and did not get any. They were not very particular about getting them.

Q. How do you know that, excepting in reference to your own practice?

A. I cannot. I supposed that was the general rule on the road. We were not very particular any way.

Q. You supposed that was the rule?

A. Not exactly the rule, but kind of a rule we took ourselves. We were not particular about getting them.

Q. Do you know, of your own knowledge, anything beyond your own practice?

A. No.

Q. How long were you conductor?

A. Some seven or eight years.

Q. What kind of train?

180 A. Freight, particularly.

Q. All the time?

A. Most of the time.

Q. I think you said conductor of local freight. What are we to understand by the word "local?"

A. It is a way freight.

Q. Conductor of a way train as distinguished from a through train?

A. Yes.

Q. Do you know, of your own knowledge, of any instance where, on or after the 20th of Sept., 1874, a train, freight or passenger, or empty engine, stopped at a telegraph station, and then went on without obtaining any clearance order?

A. No.

Direct resumed:

Q. When you are asked, by Mr. Rand, whether you know of any instance subsequent to Sept. 20th, 1874, and you answer you did not, do you mean by that that the rule was not omitted after that time, or that you cannot particularize?

A. That is what I meant. I meant I can't state any one par-

181 ticular time. A local freight is a train that does local work—leaves freight, and picks up empty cars, and leaves off loaded cars wherever they want them or they belong.

Q. Makes more stops on the road?

A. Yes.

Q. As distinguished from through freight which runs through to the West?

A. Yes.

JAMES M. LUNT, called by pl'f, testified:

Superintendent of Portland & Rochester; have been engaged in railroading about thirty years—most all kinds of railroading. I have run a locomotive some; I never lear'ed the business regularly. I acted as brakeman some little when I first began on the Grand Trunk. I have been superintendent of the Indiana Central, the Columbus, Chicago & Indiana Central, the Eaton and Hamilton, the European & North American, the Maine Central, the Portland & Rochester.

Q. While you were connected with those roads, what has been the general rule and practice when a single engine was sent out, as to the number of men sent upon it?

182 A. My own habit has been——

(Ob'j.)

Q. I mean the management under you.

COURT. The usual custom of the road; it may be done by you.

A. I should say usually three men on an engine.

Q. What exception has there been to such a rule, if any?

A. I can state in reference to the Indiana Central. Our rule was when an extra engine was to go over the road it was to precede the passenger train or the regular train which it did precede, running on the time and assuming the rights of that train, the train itself keeping three minutes behind time. That was our rule.

Q. Then it was no longer a wild engine?

A. No; it would not be regarded exactly as a wild engine, but as a part of the train. The rule was they should keep the time of the train—be governed by the schedule of that train.

Q. In the other instances I understand the practice of the road under you was to send out three men with an extra engine.

183 A. I calculated to send a conductor with them; yes.

Cross-examination:

I was last speaking of the Indiana Central. By the expression "empty engine," I understand an engine alone—an engine and tender. On that road it run on the time of the train it preceded. That engine would be running on a time-table.

Q. Did you ever send any after a regular train, the regular train duly signalling the special?

A. I think we did. There were cases where we sent them, I think. I do not remember anything very positive about it, but I have no doubt we did. I was superintendent of the Maine Central about a year or less. The Maine Central is the same as ours—the regular train carries a flag for them and the engine follows.

Q. What was the custom of that road as to the number of men that were put upon the empty engine?

A. I do not know that I could state the custom there. I know if I gave any directions about it myself it would be—my own idea

184 would be—to have three men, but I cannot say positive. I do not know that I can say what the custom was there in that regard. I do not remember of any cases coming up. It was a short time I was on the road.

Q. How is it on the road you are superintendent of now?

A. I should send three men on the engine.

Q. The custom?

A. Yes; we do that.

Q. Is that the custom?

A. Yes, sir; we send a man we call conductor and an engineer and a fireman.

Q. What is the object of the conductor?

A. The rule on all roads, and ours is the same, is that in case of accident to an engine or train on the road, the first duty of the man in charge is to send a man back or forward, as the case may be, to warn approaching trains. That would be one reason why I should want an engine manned sufficiently to do that. The conductor is generally given the orders, particularly about passing the trains, where I have been—the running orders. I think, on the Grand Trunk the white signal gives the en-

185 gine the right to follow, but no rights against any trains they meet. But those rules vary.

Q. It has been shown that a white signal carried for an empty engine the empty engine is to keep out of the way of all regular trains?

A. Yes.

Q. If you had upon an empty engine an engine-driver who was perfectly acquainted with the time-table and all the rules of the road, and the handling of his engine, what benefit would a third man be?

A. I should feel safer if anything happened. I think it would be in case of emergency. I do not know as I can give any very definite reason, excepting for safety, if anything happens to the engine, that she is not properly manned.

Q. He is no use excepting in case of accident?

A. He might not be of any use. The engineer ought to be competent.

Q. Assuming that the engine-driver is competent and understands his business, then would the third man be of any use, excepting in

186 case of accident to the engine?

A. I do not know that he would. I can see that he could be of no use. I should feel safer.

Q. If he would be of any use, state what it is.

A. I should say it would be better to have the third man there.

Q. What use would he be excepting in case of accident?

A. If he was conductor and understood his business he would be useful to tell the engineer where he was going to meet other trains, and for safety in all respects.

Q. Suppose the engine-driver was familiar with the time-table and had it with him, and by the rules was made the conductor, how would that be?

A. If the engine man was engine man and conductor both, and familiar with the whole thing required of both, I do not know why he would not be safe, excepting as his time is taken up. Sometimes there might be circumstances that his time would be taken so that he would neglect something more important.

Q. What would his time be taken up with?

187 A. His engine might work badly, foam, or a lot of things that occur to them when running.

Q. Whether or not, under any ordinary circumstances, the third man would be of any practical value, assuming that the driver and fireman understood their duties, and that by the rules of the road where they were running the engine-driver was made conductor of the empty engine?

A. I do not know exactly how that is in my own mind. A conductor with a train has two duties.

Q. I am not inquiring about that.

A. He is the sort of man we would put on the engine. A conductor who is familiar with the duties of conductor.

Q. Can you tell me anything more definite than you have already stated, in reference to the importance of the third man?

A. The conductor is supposed to be skilled in the movements of the train to a greater extent than the engineer is, because he has time. He is supposed to have time to look after that part of it particularly.

188 The engine would be in place of a train. I am assuming that the engine is just the same as a train if running over the road. I do not know that I can give anything any more definite about it, excepting that the conductor is put on as a matter of greater security—safety—in running over the road.

Q. That was the custom on the Indiana Central?

A. Yes; if we followed the train. When we sent them ahead, on the time of the train, I do not think we always sent a conductor; do not remember whether we did or not.

Q. Wouldn't there be the same difficulties in running ahead of the train as running after the train?

A. They would have a schedule to run by. We calculated that was safer. The rule was made, because we supposed it to be safer.

Q. Wouldn't the engine-driver of an empty engine have a time-table before him?

A. Yes; but not running on the time-table.

189 Q. But he knows where the other trains are, and what time they are due?

A. Yes.

Q. Then, doesn't he, with that time-table, know just as much as the conductor would as to where the other trains are?

A. He ought to.

Q. Wouldn't he, assuming that he knew the time-table?

A. I do not know of any reason why he would not.

Direct resumed:

The time and attention of the engine-driver is taken up to some considerable extent with the management of the engine, looking at the water, watching the road, watching for anything out of the way in his engine, etc.

Q. If he is a new man to the business of driving an engine, how would it be in that case if he had not had long experience so as to familiarize him?

A. That would be entirely a matter of opinion. It depends upon what

the new man was, what sort of a man he was. I have worked a
190 locomotive more or less, but not regularly.

FRED. H. PARSONS, called by pl'f, testified:

Residence, Mechanic Falls.

Q. What has been your occupation?

A. Station agent and telegraph operator on the Grand Trunk at Mechanic Falls for about twenty years. I left the employ of the road January, 1878. Mechanic Falls is a telegraph station.

Q. State what the fact was upon that road relative to conductors and others having charge of trains, freight and special trains, etc., in regard to the observance of the rule requiring the obtaining of clearance orders prior to March 6, 1875.

A. That rule was not always observed.

Q. What did the conductor do in obtaining a clearance order? State the necessary steps.

A. He stopped his train, came into the office, and asked if there was any order for the train that affected the running of his train, and,
191 if not, to obtain a clearance order.

Q. Did he sign anything?

A. Yes; we had a book to enter that clearance in, and obtain his signature or receipt for the clearance or order, as it might be.

Q. Just what was that book kept for?

A. To show that the conductors did get those orders.

Q. What was done with it?

A. It was kept at the station.

Q. Were those books examined by the officers of the company?

A. Occasionally the assistant superintendent examined the book. I cannot state how often. He was over the road frequently. He did not always come in to examine the book; but sometimes he did.

Q. Liable to come at any time?

A. Yes; the book was open to his examination at any time. He might do it once a month, or once in three months. I cannot state exactly.

Q. Was or not the object of that book to give information?

A. I suppose that was the object of the book. I knew Charles D. Noyes.

192 Q. Did he run on these trains where the clearance orders were omitted?

A. Yes; I think so. I presume he did. I did not have much to do with the engine-drivers or firemen. My business was with the conductors mostly.

Cross-examination:

It was the duty of the conductor to obtain those clearance orders from the operator. The engine-driver wouldn't have to go in to see about them. There was a rule upon that point directing who. A clearance order was given to the conductor only. Any other order affecting the running of the train was addressed—a copy given to each, the conductor and driver.

Q. Affecting the running or crossing, or anything of that kind, you mean?

A. Yes.

Q. In that case the driver did not get off?

A. No; we gave it to the driver as he passed the station. It was supposed that the conductor would come to the office for his; but the driver, we usually gave them to him on the engine, because it would not
193 be convenient for him to leave the engine. I did not give the driver a clearance order.

Q. If a train did not stop at a station, there would not be any clearance order?

A. No; I should not suppose we would give an order unless they stopped for it.

Q. Did you know it was customary on that road for trains that stopped to leave without obtaining clearance orders.

A. They often did it.

Q. That is not the question.

A. At the station where I was all trains did not stop—not always.

Q. They were not all required to stop?

A. I think that after this rule in regard to getting clearance orders was put in force, all trains were required to stop; but I cannot think what the rule or custom was previous to that.

Q. Do you think that after Sept. 20th, 1874, all trains were required to stop?

A. That is my impression.

Q. You are familiar with these rules?

A. Yes. (Paper shown to witness.)

Q. That is the time-table in force at the time of the accident.
194 Do you see any rule there requiring them to stop?

A. I cannot tell without looking it all over.

Q. I do not see any rule on the time-table that requires them to stop.

A. I do not state positive, but my impression was so.

Q. Look at 7 and see if that is the one. (Witness looks on paper shown him.)

A. Yes; that is the rule I referred to. I should suppose that the trains would stop.

Mr. Rand. The other part of the rule shows that is not the proper construction.

Court. I should construe it that he was not bound to stop there.

Q. In reference to these orders; have you one of those books?

A. It was a large book, as large as that (stenographer's book), but little longer. It was a blank book that was sent to us, entirely blank. The operator made the entries on it.

Q. What did he enter?

A. In case of a crossing order, he would copy the order into that book as he received it from the train dispatcher. The order would be
195 addressed to "conductor and driver," giving the number of the train. If he had no orders he would enter a clearance order or a receipt, which would read, "Received clearance order for train," so & so, and the conductor would sign it.

Q. That should have been entered, according to the rule, whenever a train stopped there, as you understand it?

A. Yes.

Q. Were you aware at the time that this rule 7 was not always observed?

A. Yes.

Q. Did you communicate that information to any of the officers of the company?

A. No.

Q. Never did?

A. No.

Q. You never communicated it to the superintendent or assistant superintendent?

A. No.

Direct resumed:

Q. Was there a change made from entering on that book?

A. Yes; there was a sheet called a train-sheet or crossing-order sheet.

Q. Were they required to sign the sheet?

196 A. They were.

Q. Where was the sheet sent?

A. To the assistant superintendent.

Q. How often?

A. Every day.

Q. When did that change take place?

A. Some time since 1875, I think. I would not be positive to the time exactly.

Q. How long after this accident?

A. It occurs to me it was directly after that.

Cross resumed:

Q. There wasn't any such train-sheet before?

A. No; I think the book was in use before that time.

Q. Don't they use the book now?

A. The crossing orders are put into a book. They do not use the book for clearance orders.

Q. Now they have a train-sheet which is made up every day?

A. Yes.

Q. And that practice was adopted since March 6, 1875?

A. Yes.

197 Q. Whether they use also the book you spoke of, or whether the train-sheet takes the place of the book?

A. That is my impression, that the conductors sign the sheet instead of the book. The sheet shows whether they get a clearance order or any other order. One of the headings to the sheet is, "What orders received." If he receives a clearance order, that is entered in that column, and the conductor signs for it.

Q. Did the sheet contain any more information than was on the book?

A. No.

EDWARD C. STOWELL, called by pl'f, testified:

Q. I understood you to say you boarded with Noyes prior to the accident?

A. I did.

Q. State whether you heard him speak in relation to this non-observance of the rule as to obtaining clearance orders.

Mr. RAND. I object, if it was after the accident.

Mr. STROUT. Both before and after, as I understand.

198 WITNESS. The talk was after, but the business was before.

COURT. The talk cannot be given in evidence.

Q. Prior to the accident, can you remember of the substance of any conversation, either by Noyes or in his presence, in relation to or touching this matter of the non-observance of this rule?

A. No.

Q. Have you any recollection about it prior to the accident?

A. No, sir.

WILLIAM G. PHELPS, called by pl'f, testified:

I work in Norway. My home is in South Paris. I know Charles D. Noyes. I have known him for the last nine or ten years; might have been little more.

Q. Attend school with him?

A. Yes.

Q. What was his age in March, 1875—March 5th, say?

A. I should judge him to be about twenty. About my own age at that time. My age is twenty-four. I attended school with him at South Paris. He was in the same grade that I was, in the same classes really.

199 Q. State what the fact is at that time, whether he was known as of your age?

A. I always considered him so. He was in my classes, & a playmate of mine always, ever since I have known him.

Cross-examination:

Q. You do not know his actual age?

A. No; I cannot swear exactly to his age.

Direct resumed:

Q. You say you know what they called it?

A. I know what they considered him.

WILLIAM F. STONE, called by pl'f, testified:

Residence, South Paris. My age, twenty-four last September. I know Charles D. Noyes; think I have known him as much as fifteen years, but I am not positive; it seems as long as that.

Q. Schoolmate with him?

A. Yes.

Q. Playmate?

A. Yes; lived the next house to him part of the time.

Q. What is his age?

200 A. I always judged him to be about my age.

Cross-examination:

Q. Do you know the age of Charles D. Noyes?

A. I do not know his age, only I was a playmate with him, and always judged him about my age.

N. D. BOLSTER, called by pl'f, testified:

Residence, South Paris; have resided there twenty odd years.

Q. Do you occupy any position of trust there in the town?

A. Town treasurer.
Q. How long have you been treasurer?
A. On my fourth year; I knew Charles D. Noyes; have known him ten or twelve years.
Q. At school with him?
A. Yes.
Q. How long ago were you at school with him?
A. 1865 to 1867, probably. I have probably known him more than ten or twelve years; I have known him ever since he moved into
201 town; he was then a young lad, a young boy from ten to thirteen years of age.
Q. Were you in the same grade with him at school?
A. I was above him. My age is twenty-eight now.
Q. What was his age as to yours, younger or older?
A. Four years younger.

Cross-examination:

Q. Do you know the age of Charles D. Noyes?
A. Not by any exact date.
Q. Do you know by any exact year?
A. No.
Q. You do not know what year he was born in?
A. No.

NATHAN WALKER, called by pl'f, testified:

I have been connected with the Grand Trunk. I began on the road by taking charge of a gravel train in 1853; I run that 1853,' 4,' 5, and 6; then I left the road for a term of years. I think I commenced on the road again in 1866.

Q. When did you leave the service of the *of the* road?
202 A. In 1874, I think, was the last work I did on the road.
Q. Whether or not you remember in relation to any instance of the non-observance of this rule in relation to clearance orders?
(Objected to.)
Q. How was the rule observed?
Mr. RAND. This man occupied no position on the road that enabled him to know.
Q. When you came back onto the road what was your business?
A. I had charge of fencing from the boundary line to Portland most of the time. I had charge of distributing ties that distance, more or less of the time. I had charge of seeing to the receiving of steel rails out of the steamers up to the time I got hurt on the road.
Mr. STROUT. I expect to show that he saw these trains go by the stations, where they should have stopped to obtain clearance orders, and leave the orders at the stations. He recollects one particular instance.
COURT. It is of very slight moment; I do not know that it is not admissible, but it seems to be of very trifling consequence.
203 Q. You had a train under your charge?
A. I did.
Q. Then I will put the general question. What was it in relation to the observance of this rule as to clearance orders prior to 1875?
(Objected to.)

COURT. Fix the date.

Q. When was it you had charge of the train and what kind of a train was it?

A. Construction train. That was back before they received those clearance orders.

Q. After the clearance orders were given out?

A. I did not have charge. I simply rode on the train with my men to distribute lumber.

Q. Did you visit offices where these clearance orders were?

A. I used to sometimes.

Cross waived.

(The testimony respecting the nature and extent of the plaintiff's
204 injuries and his present condition is not reported, inasmuch as it has no relevancy to the questions of law raised by these exceptions.)

The plaintiff also introduced in evidence a book of rules, marked "C;" such extracts from which as either party desires make a part of the case. Also time-table No. 2, with rules thereon. Plaintiff also introduced in evidence the following order, dated March 6, 1875:

"DRIVER No. 312 ENGINE:

"No. 4 carries white signal to Gorham for you; 17 of yesterday and 11 of to-day cancelled.

"W. J. SPICER."

Plaintiff also introduced in evidence rule 7, which makes a part of the case, and the following order:

"PORTLAND, *March* 5, 1875.

"N. JACKSON: You can swap off with Noyes when you meet him in the morning. I want your engine to follow No. 4 to Gorham to take trains east. Show this to Noyes. Noyes, you can change with Jackson.

"Yours,

"J. N. MARTIN."

205 After the introduction of the foregoing testimony the plaintiff rested his case.

The defendant thereupon moved the court to instruct the jury that the plaintiff, upon the foregoing testimony, is not entitled to recover, and that they return a verdict for defendant. Which instruction the court declined to give; to which ruling and declination the defendant then and there excepted, and prayed that its said exception might be allowed.

The defendant then introduced evidence touching the points covered by the plaintiff's testimony upon which there was cross-examination by the plaintiff.

The defendant did not contend that the plaintiff was guilty of contributory negligence.

The court gave to the jury sundry instructions not excepted to, and at the request of plaintiff also instructed the jury that if Noyes was negligent and if the defendant company was also wanting in ordinary care and prudence in discharging their duties, and such want of ordinary
206 care contributed to produce the injury, and the plaintiff did not

know of such want of ordinary care and prudence, the defendants would be liable; that if two of those causes contributed, the company would be liable; that the mere negligence of Noyes of itself does not exonerate them, if one of their own faults contributes.

To which instructions, and to the ruling and declination aforesaid, and each and every of them, the defendant then and there, in open court, and before the cause was committed to the jury, excepted and prayed of the court that said exceptions, and each of them, might be allowed.

The jury returned a verdict for plaintiff, assessing his damages at ten thousand seven hundred and ninety-one dollars.

And inasmuch as the matters hereinbefore referred to, and said ruling and instructions would not otherwise appear by the record of said cause, the counsel on the part of said defendant corporation prayed the court to sign this bill of exceptions containing the several matters given in
207 evidence, and the rulings and instructions of the court thereon, and the exceptions thereto, that the same may become a part of the record of said cause.

All of which being found to be true, is allowed.

In witness whereof I have hereunto set my hand this first day of July, in the year of our Lord one thousand eight hundred and seventy-nine.

JOHN LOWELL,
*Circuit Judge.*

208 (Bk. 94). Grand Trunk Railway of Canada. Book of Rules and Regulations.

This book applies to the Grand Trunk Railway, and also to the lines of the Montreal & Champlain and Buffalo & Lake Huron Railways, now worked by the Grand Trunk Company.

Montreal: The "Gazette" Printing House, St. Francois-Xavier street. 1873.

209 Copy of a report of a committee of the honorable the executive council, approved by his excellency the governor-general in council, on the 23rd September, 1865.

On the recommendation of the hon. the attorney-general, L. C., the committee advise that the by-laws, rules, special rules, regulations, and orders for the use and guidance of servants, employés, and officers of the Grand Trunk Railway Company of Canada, passed and adopted at a meeting of the board of directors of that company, held at Montreal, on the 4th day of August, A. D. 1865, and hereunto annexed, be approved.

Certified.

(Signed) W. A. HIMSWORTH,
*A. C. E. C.*

210 GRAND TRUNK RAILWAY COMPANY OF CANADA.

At a board meeting of the directors of the Grand Trunk Railway Company of Canada, held in Montreal, on the 4th of August, 1865, it was resolved:

"By virtue of the powers and authority vested in us, as directors of

the Grand Trunk Railway Company of Canada, we, the said directors, do order and enact:

"That the several and respective by-laws, rules, special rules, regulations, and orders, hereinafter contained, and each of them, shall be, and they are hereby enacted, adopted as, and declared to be, the by-laws, rules, special rules, regulations, and orders of the Grand Trunk Railway Company of Canada, for use upon the railway of the said company, including the several lines now worked by the Grand Trunk Railway Company of Canada, and that as such they shall be binding upon each and every servant, employé, and officer of the company in every respect in which they shall relate to his or their conduct in the discharge of his and their duties; and that for any contravention of any one or more of these rules, special rules, regulations, or orders, the offender shall, over and above any penalty in the said rules, special rules, regulations, and orders specified, be prosecuted under the statutes in such case made and provided.

"That all former rules and regulations inconsistent with these now enacted be cancelled, and that these now sanctioned do come into effect on and after the 23rd day of September, 1865. That every person in the company's service shall always have a copy of these rules, special rules, regulations, and orders in his possession, under penalty of one dollar fine for neglect in this respect."

211 *General regulations.—Applicable to all servants of the Grand Trunk Railway Company.*

☞A copy of these rules and regulations will be given to each employé engaged in the working of the line, and a receipt on a printed form taken from him.

In addition to this a copy of these rules and regulations, printed on a sheet and framed, will be hung up in every station; engine-shed, conductor's room, &c., where it will be open to the inspection of every employé of the company;

And no excuse will be admitted of want of knowledge of the rules, should any employé not have received and receipted for a copy.

212 1. Each person is to devote himself exclusively to the company's service, residing where he may be required.

2. He is to obey promptly all instructions he may receive from persons placed in authority over him, and to conform to all regulations of the company.

3. All enginemen when on the line on duty must obey the orders of the local superintendents on the respective divisions on which they have severally jurisdiction, whether the same shall be communicated verbally, by telegraph, or by written order; and in all cases where any message or order directing the train or engine to proceed cautiously or at a named rate of speed over any part of the said railway, or any bridge or viaduct thereof, is given to the conductor of any train he shall at once hand the same to the engineman in charge of the engine, and call his attention to the contents thereof, and the engineman shall retain the same in his possession. And if any engineman shall, after the receipt of such message or order, incautiously or at a greater rate of speed than that named in the said

213 order or message, drive his engine over the portion of the railway

or the bridge or viaduct named in the said message or order, he shall at once be dismissed the company's service, and also punished for disobedience to the utmost rigor of the law; and any conductor failing to obey the requirements of this order will be for such offense punished in the same manner.

4. Any employé will be liable to criminal punishment for disobedience or negligence of orders, and to fine or dismissal for misconduct, incompetency, or using improper language while on duty.

5. No employé to receive a fee or reward from any person without the sanction of the company.

6. No employé of the company is to smoke when on duty, or on or about the company's premises.

7. Any person intoxicated when on duty will be dismissed.

8. Any case of rudeness, or incivility to passengers, will be severely punished.

9. Every person must appear on duty clean and neat.

214 10. No person is allowed under any circumstances to absent himself from duty, without the permission of his superior officer, except in case of illness, and then notice is to be immediately sent to his superior officer, in order that a substitute may be found in due time.

11. No person is to quit the company's service without giving fourteen days' previous notice; and in case he leave without such notice all pay then due will be forfeited.

12. The company reserve the right to deduct from the pay such sums as may be awarded for neglect of duty as fines and for rent due to the company.

13. Any person subjecting the company to the service of a saisie-arret or garnishing order on their pay, will be liable to dismissal, and will be held responsible for all expenses incurred by the company.

14. Every employé shall make himself thoroughly acquainted with all the rules and regulations of the company, including those contained in the working time-table of the district on which he is employed, and shall keep a copy of the same in his possession under a penalty of $1.

215 15. And on the occasion of an alteration taking place in the running of trains, it shall be his duty to procure and carry with him at all times a copy of the time-table applying to the district in which he is employed.

16. The regulations regarding the running of trains are printed on every time-table, and are to be read and considered as a part of these rules.

216 *Signals.*

LAMPS AND FLAGS.

RED is a signal of "DANGER—STOP."
GREEN, "CAUTION, PROCEED SLOWLY."
WHITE, "ALL RIGHT—GO ON."

These signals will be made by flags in the day time, and by lamps at night.

In addition to this, any signal waved violently, or a man standing with

both arms raised above his head, denotes danger, and the necessity of stopping immediately.

The absence of a signal at a point where one is usually displayed is to be taken as denoting danger.

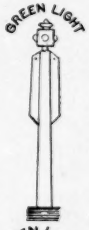
WHISTLE SIGNALS.

To PUT ON BRAKES, one whistle.
To START or TAKE OFF BRAKES, two whistles.
To BACK, three whistles.
To TURN SWITCH, four whistles.
DANGER, repetition of short, sharp whistles.
On approaching level crossings of public roads and curves, one long whistle.

217 *Distance and semaphore signals.*

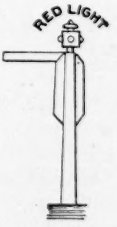
These signals are being introduced on the line, and where they exist the following are the regulations relating to their use:

The "all right" signal is shewn during day by the arm being within the post. Thus ☞ and by a green light on top of the post at night, which also means caution, "To come on slowly."




The "caution" signal to slacken speed is shewn during day by the semaphore arm being raised to an angle. Thus ☞ or by a green light at night.

The "danger" signal always to stop is shewn during the day by the arm being raised to the horizontal position. Thus ☞ or by a red light at night.




218 At drawbridges, crossings of other railways, and junctions, the semaphore arms for day and the lamps for night signals are always to be set at danger, and every engine and train must come to a full stop before reaching the signal, and not proceed until the signal to come on is shewn,

and the man in charge must not alter the signal until trains or engines have been brought to a full stop.

All signal lamps must be lighted at least half an hour before dark. They must be kept burning brightly all night, and extinguished half an hour after daylight.

219 *Directions for the use of detonating signals.*

1. During foggy weather, snows storms, or at any time when the ordinary signals cannot be seen, detonating signals are to be placed on the rail (label upwards), by bending the lead clip round the upper flange of the rail to prevent its falling off. When the engine passes over the signal it explodes with a loud report, and the driver is instantly to stop.

2. The use of detonating signals is to be in addition to the regular day and night signals of the line, which must be first exhibited.

3. Whenever an accident occurs to a train, or the train is stopped on the line from any cause at any place other than a station, by which the line is obstructed, the conductor and brakesman must go each way at least 800 yards (or sixteen telegraph poles), or more if near a steep grade or a curve, to stop an approaching engine or train; and as each proceeds, he is to place on the rail, at a distance of every 200 yards, one
220 of these signals; and on his arriving at the end of the above mentioned distance, he is to place two signals on the line of rail.

4. Whenever an engine passes over one of these signals, the engine-driver and conductor are immediately to stop the train, and the conductors are to protect their train by sending each way and placing a signal on the line every 200 yards, to the distance of a quarter of a mile, and then proceed slowly to the place of obstruction.

5. Every driver of an engine not accompanied by a conductor, is to use these signals in case of accident or obstruction, in the manner before mentioned; he and the fireman fixing them as the conductors are herein directed. And when an engine passes over one of the signals, the driver, having stopped his engine, is to send back and place on the rail one signal every 200 yards, for the distance of a quarter of a mile, and then proceed slowly to the place of obstruction.

6. After the obstruction of the line is removed, the conductor or engine-driver must remove all the signals from the rails before proceeding.

221 7. In any of the above circumstances, and in the absence of either of the officers above mentioned, any engineman, foreman of works, or any other servant of the company, is to observe the same rules to guard against danger.

8. Every conductor, switchman, engineman, and foreman of trackmen, must provide himself with twelve detonating signals each; which they are always to have ready for use whilst on duty; and every station agent must provide himself with 12 signals, which are to be kept in an unlocked drawer or shelf, in order that they may at all times be easy of access to all on duty at the station; and every person connected with the station shall be made acquainted with the place where they are deposited.

9. All the persons above named will be held responsible for having the proper supply of detonating signals. When one or more are expended, it is their duty immediately to apply to their superior officer for a further supply of them, to keep up the stock as above directed.

222 *Table shewing the speed of an engine, when the time of performing a quarter, half, or one mile is given.*

| Speed per hour. | Time of performing ¼ mile. | Time of performing ½ mile. | Time of performing 1 mile. | Speed per hour. | Time of performing ¼ mile. | Time of performing ½ mile. | Time of performing 1 mile. |
|---|---|---|---|---|---|---|---|
| *Miles.* | *m. s.* | *m. s.* | *m. s.* | *Miles.* | *m. s.* | *m. s.* | *m. s.* |
| 5 | 3 0 | 6 0 | 12 0 | 33 | 0 27 | 0 54 | 1 49 |
| 6 | 2 30 | 5 0 | 10 0 | 34 | 0 26 | 0 53 | 1 46 |
| 7 | 2 8 | 4 17 | 8 34 | 35 | 0 25 | 0 51 | 1 43 |
| 8 | 1 52 | 3 45 | 7 30 | 36 | 0 25 | 0 50 | 1 40 |
| 9 | 1 40 | 3 20 | 6 40 | 37 | 0 24 | 0 48 | 1 37 |
| 10 | 1 30 | 3 0 | 6 0 | 38 | 0 23 | 0 47 | 1 34 |
| 11 | 1 21 | 2 43 | 5 27 | 39 | 0 23 | 0 46 | 1 32 |
| 12 | 1 15 | 2 30 | 5 0 | 40 | 0 22 | 0 45 | 1 30 |
| 13 | 1 9 | 2 18 | 4 37 | 41 | 0 21 | 0 43 | 1 27 |
| 14 | 1 4 | 2 8 | 4 17 | 42 | 0 21 | 0 42 | 1 25 |
| 15 | 1 0 | 2 0 | 4 0 | 43 | 0 20 | 0 41 | 1 23 |
| 16 | 0 56 | 1 52 | 3 45 | 44 | 0 20 | 0 40 | 1 21 |
| 17 | 0 52 | 1 46 | 3 31 | 45 | 0 20 | 0 40 | 1 20 |
| 18 | 0 50 | 1 40 | 3 20 | 46 | 0 19 | 0 39 | 1 16 |
| 19 | 0 47 | 1 34 | 3 9 | 47 | 0 19 | 0 38 | 1 16 |
| 20 | 0 45 | 1 30 | 3 0 | 48 | 0 18 | 0 37 | 1 15 |
| 21 | 0 42 | 1 25 | 2 51 | 49 | 0 18 | 0 36 | 1 13 |
| 22 | 0 40 | 1 21 | 2 43 | 50 | 0 18 | 0 36 | 1 12 |
| 23 | 0 39 | 1 18 | 2 36 | 51 | 0 17 | 0 35 | 1 10 |
| 24 | 0 37 | 1 15 | 2 30 | 52 | 0 17 | 0 34 | 1 9 |
| 25 | 0 36 | 1 12 | 2 24 | 53 | 0 17 | 0 34 | 1 7 |
| 26 | 0 34 | 1 9 | 2 18 | 54 | 0 16 | 0 33 | 1 6 |
| 27 | 0 33 | 1 6 | 2 13 | 55 | 0 16 | 0 32 | 1 5 |
| 28 | 0 32 | 1 4 | 2 8 | 56 | 0 16 | 0 32 | 1 4 |
| 29 | 0 31 | 1 2 | 2 4 | 57 | 0 15 | 0 31 | 1 3 |
| 30 | 0 30 | 1 0 | 2 0 | 58 | 0 15 | 0 31 | 1 2 |
| 31 | 0 29 | 0 58 | 1 56 | 59 | 0 15 | 0 30 | 1 1 |
| 32 | 0 28 | 0 56 | 1 52 | 60 | 0 15 | 0 30 | 1 0 |

223 *General orders to engineers.*

1. The engineman of every train must be in attendance half an hour and the fireman forty-five minutes before the appointed time for starting the train, and the engine coupled at least ten minutes before the time for starting, and the former must see that his engine is in proper working order, sufficiently supplied with fuel and water, and properly oiled, and that the lamps and signals are in a fit state for use. Before taking charge of the engine they must sign their name in the appearance book kept by the locomotive foreman.

2. Every engineman shall have with him at all times in his tender the following tools:

1 complete set of lamps, viz, head lamp, 2 red, and 2 white ditto.
1 complete set of screw keys.
1 large and small monkey wrench.
3 cold chisels.
2 hammers.
1 crow-bar.
2 short chains with hooks.
2 bottle-jacks or one traversing-jack.
A quantity of flax and twine.
4 large and small oil cans.
Plugs for tubes and irons.
2 fire buckets.
12 detonating signals, 2 white and 2 red flags.
1 steel shovel.

N. B.—The engineman to be responsible for the above tools;
224 and any of the men found guilty of destroying them will be fined or dismissed for so doing, as the case may be.

Every engineman and fireman must have a good watch.

3. No person, except the engineman and fireman, shall be allowed to ride on the engine or tender without the permission of the general manager, superintendent, engineer, or chief officer of the locomotive department. Conductors and brakesmen in charge of trains, or off duty, on no account to be allowed to ride on the engine.

4. The engineman is always to receive the signal from the conductor for starting the train, and he is immediately to answer it by two short whistles. At starting the engineman must be careful not to injure the couplings by a sudden jerk, and he must look out behind to see that the train is properly attached.

5. The engineman is to stand by the hand-gear and keep a good look-out for signals, &c., all the time that the engine is in motion, and the fireman is also to keep a good lookout, except when engaged with his other duties.

225 6. No engine is to run on the line tender foremost, unless by orders from the superintendent, or from unavoidable necessity.

7. No engine is to propel before it a train, unless by order of the superintendent.

8. No engineman on duty must ever leave his engine, except in cases of great necessity, when he must take care to leave it in charge of his fireman; but on no account whatever shall both leave it, either on the main line or on any siding of the road, or until it be given up to the proper person appointed to receive it.

9. When a train is to be stopped unexpectedly, the engineman must give the signal for the brakes, and repeat if necessary.

10. He must not allow the fireman to shunt cars or move the engine at all, and, when shunting cars at stations or sidings, the engine must not be uncoupled from them until they are at a stand, and neither must they be shunted at so great an impetus as to endanger the lives of men employed in coupling, or in any way injure the property of the company.

226 11. When there is an unavoidable necessity, from an accident or other special cause, for an engine to stop on the main line, the engineman must send a man, with a signal, to the distance of 800 yards (or sixteen telegraph poles) or more, if near a steep grade or curve, in order to protect the train or engine.

12. The engineman and fireman must always keep a good look-out and pay immediate attention to all signals, whether the cause of the signals be known to them or not.

13. The bell and whistle are always to be sounded when approaching a cutting, station, or junction, and engine-drivers are to take care that the whistle be sounded 800 yards before reaching every level crossing of a public road, and that the bell be rung 600 yards before reaching such crossing, until the crossing be passed. In foggy weather the utmost vigilence and caution must be used, and the whistle blown at least every mile.

14. Ballast, wood, or construction trains, or empty engines are prohibited from passing along the line in a fog, except when specially authorized to do so.

227 15. No engineman is to pass from a branch onto the main line until the switchman signals the main line clear.

16. Trains are under the orders of the conductor, to whose instructions

as to stopping, starting, &c., the engineman is to pay particular and careful attention.

17. In cases of doubt or difficulty, relative to running the trains, enginemen and conductors must consult each other, as they will be held equally responsible for any violation of the rules through forgetfulness, negligence, or any other cause.

18. Whilst the train is in motion, the engine-driver will be held responsible for compliance with the company's rules and attention to signals.

19. If any part of a train is detached when in motion, care must be taken not to stop the train in front before the detached part has stopped, and the conductor or brakesmen of such detached part must apply his brake in time to prevent a collision with the cars in front.

20. In approaching stations and crossing all bridges and via-
228 ducts, and in passing wood-piles all trains are required to run at reduced speed and with extreme caution, and the engines to have their dampers closed.

21. The targets of all switches should be perceived to be correctly set before they are passed, and in starting their trains enginemen must be most careful to ascertain that the switches are right.

22. Every engineman must carefully examine his engine after each journey, and he must immediately report to the locomotive foreman, and enter in the book that is kept for that purpose any defect or deficiency in the engine or train. He must also report to the locomotive foreman, and to the station master or station clerk at the nearest station, and at the terminal station, any accident, neglect, or irregular occurrence that he may have observed upon the journey. No engineman, when acting without a conductor, shall, without the express permission of the station agent, move his engine, on any pretence, from any siding onto the main line.

23. In running behind another train, he must so run as to allow the train to be not less than one mile in advance, and in approaching a
229 station and entering or running round curves, great caution must be used to avoid the possibility of running into the train ahead. No excuse as to being deceived about the distance will be received for neglect of this rule.

24. In approaching stations, never depend upon information as to where the train ahead will stop for wood or water, or other cause; always be prepared to stop short of the station.

25. All enginemen and firemen will be held responsible for a strict compliance with these orders in respect of any train or engine to which they belong, and they are required to report immediately to the superintendent any of the company's servants who shall refuse or neglect to use the precautions hereby ordered to be adopted.

26. Enginemen in bringing up their trains are to pay particular attention to the state of the weather and the condition of the rails, as well as the length of the train, and these circumstances must have due weight in determining when to shut off the steam. Stations must not be entered so rapidly as to require violent application of the brakes, and any engineman overrunning the station will be reported.

230 27. Should fire be discovered in the train the steam must be instantly shut off, and the brakes applied and the train be brought

to a stand, the signal of obstruction to the line be made, and the burning car or cars be detached with as little delay as possible. No attempt must ever be made to run to the nearest tank if it is more than three hundred yards from the place where the fire is discovered, as such a course is likely to increase the danger.

231 *Conductors, &c., on passenger and mixed trains.*

1. Every conductor, baggageman, and brakesman is to be at the station from which he is to start half an hour before the appointed time. He shall wear a badge on the front of his hat or cap denoting his office whilst on duty. The conductor is to see that he has on the train:

1 axe.
1 saw.
1 hammer.
1 two gallon oil-can.
1 oil filler.
1 pair scissors.
1 case containing 12 detonating signals.
1 broom.
Bell cord.
1 tail rope.
1 water pail.
1 chain 12 feet long, with hooks attached.
1 lb. sulphur.
3 red lamps.
2 white lamps.
2 red, 1 green, and 2 white flags.
1 tail lamp.
6 links and 6 pins.

2. Until the train starts the conductor will be under the orders of the station master. Previous to the train being started the conductor must see that the cars are all properly coupled; that there are proper brakes on the train; that the signal lamps are attached and lighted if required;
232 that the bell cord is properly attached from the engine to the rear of the train, and that the cars are in a proper state of cleanliness.

3. At each terminal station a conductor's book is kept, in which all circulars and orders affecting trains, the working of the line, &c., will be inserted, and it will be the duty of each conductor regularly to inspect the book and sign his name in the margin against each order or notice to show that he has seen it and understands it.

4. After the train is started it is entirely under the control of the conductor (except when his directions conflict with the rules and regulations, or involve any risk or hazard, in either of which cases all participating will be held alike accountable); the passengers are in his charge, and he is responsible for the safety and regularity of the train, which he must never allow to proceed beyond its regular station for meeting until the arrival of the train due, unless certain advice that it will not come, or written instructions to the contrary, be received from the superintendent or train dispatcher.

233 5. Whenever a fare is collected in the cars the conductor must at once issue a ticket to the passenger and enter the amount in his book. No excuse will be admitted for any departure from this rule.

6. The conductor must, immediately on arrival at the next station, report to the station master any defect in the line.

7. The conductor is responsible for the special rules of the company being properly enforced while the train is upon the line.

8. Before leaving a terminal station the conductors are to make out a return according to a printed form, or enter in a book provided for that

purpose, all delays or circumstances of an unusual character that may have happened.

9. Every conductor is to observe the strictest attention and obedience to all signals and auxiliary signals at crossings, stations, or any made by trackmen on the line, as well as to respect all special orders which the officer in charge of stations may think necessary.

10. Conductors will be held responsible for having the full complement of brakesmen on their trains.

234 11. The conductor has time on the journey to examine the wheels, brakes, and journals of the cars, and can have no excuse for allowing them to be neglected. It will always be presumed that he is inattentive to his duties if they are neglected.

*Conductors of freight trains.*

1. In addition to the foregoing, conductors and brakesmen of freight trains must be in attendance half an hour before the time fixed on the time bill for the departure of the train, to see that the cars are properly coupled, oiled, and in good order to run. They are to see that they have on the train:

| | |
|---|---|
| 1 axe. | 1 chain, 12 feet long. |
| 1 saw. | 1 switch or tail rope. |
| 1 hammer. | 1 lb. sulphor. |
| 1 two gallon oil-can. | 2 red lamps. |
| 1 oil filler. | 3 white lamps. |
| 1 pair scissors. | 2 red, 1 green, and two white flags. |
| 1 case of 12 detonating signals. | 1 tail lamp. |
| 1 broom. | 5 brake bolts. |
| 2 water pails. | 1 tail rope. |
| 12 links and 12 pins. | 1 bell cord. |

235 2. The conductor is responsible for the attachment of signal lamps and bell cord to the train.

3. The conductor is to enter on his way bill any delays or casualties, and report the same on arrival to the proper officer. When any cars are left on the road which should have been taken forward, the conductor must instantly on arrival give notice of the same.

He must take no loaded cars without way bills, and no way bills without the proper cars.

He will see that the doors of the cars are at all times properly secured. Whether empty or loaded they must always be closed while in transit.

He is to see that all the brakesmen are at all times kept at their posts, so as to be ready for all emergencies.

When followed by a train he must have signals ready for instant use.

4. The conductor is to receive and enter on his way bill such dispatch bags, parcels, invoices, and letters as may be delivered to him, and must be very particular to deliver correctly any parcels of goods with way bills which may be entrusted to him at roadside stations.

236 BRAKESMEN.

Brakesmen are to be near their brakes while the train is in motion, and

at least one brakesman employed on freight trains must be on the top of the cars while the train is in motion.

Freight conductors and train baggagemen must act as brakesmen.

The bell cord must on no account be removed until the train has fully stopped at the terminus.

TRAIN BAGGAGEMEN.

1. Train baggage men must wear, upon their hats or caps, a badge denoting their office. They must report any baggage they receive that is not properly marked and checked, and will keep a proper account of all baggage checked and unchecked, shewing stations at which received and delivered, and send in a correct report of the same at the end of each journey. They will be held accountable for all mistakes in transit, and must not allow any persons except those working the train to ride in the
237 baggage car. No checks to be removed from baggage in baggage car, and all baggage to be left where marked for when put in car.

2. No checks must be carried loose in baggage car, but in the box supplied for that purpose.

3. Great importance is attached to the most prompt delivery of letters, way-bills, and dispatches consigned to the care of a baggage-master; and any neglect in this matter will be severely dealt with.

4. No baggageman must leave the station at the end of the journey until all his baggage has been claimed or properly disposed of.

*Station regulations.*

1. Passengers purchasing their tickets before entering the cars will effect a saving of 10 cents.

2. Passengers must be personally informed that before they can have their baggage checked they must procure tickets at the ticket office, and show them to the station baggage-master.

3. To avoid all mistakes, all passengers must attend personally to the checking and marking of their baggage; and all baggage will
238 be left at the place designated when put in the baggage car, and must be claimed by the owner on the arrival of the train.

4. Runners for railroads, boats, and hotels, and carters or cabmen will not be allowed to enter the stations, nor come upon the platforms on the arrival of passenger trains to solicit or influence passengers, but may stand in such places as directed by the agent or police.

5. Cabmen and porters with checks will be admitted to obtain the baggage; they will also be admitted when taking baggage to the trains.

6. Hotel omnibuses, baggage-wagons, and private carriages must be arranged in the station grounds as directed by the agent or police. Unnecessary noise, and obscene and abusive language, are strictly forbidden.

7. The waiting-rooms are for the traveling public only; all other persons will be excluded. No smoking allowed.

8. No person must be allowed to get into or upon or quit any car after the train has been put into motion, or until it stops. Any person
239 doing so, or attempting to do so, has no recourse upon the company for any accident which may take place in consequence of such conduct.

9. Passengers are required to take notice that all baggage will be checked to the destination named on the tickets issued for the continuous trip and through tickets. Passengers holding such tickets cannot have their baggage checked to any station short of said destination.

*Station masters and clerks.*

1. Every station master or person in charge is held responsible for the efficient protection of the whole of the offices, buildings, and other property connected therewith, and must daily inspect every room in the station, as well as the outbuildings, and see that they are kept clean and in good order.

2. He is responsible for the efficient discharge of the duties devolving upon the company's servants at the station.

3. He is to see that all general and other orders are duly entered
240 and executed, and that all books and returns are regularly written up and neatly kept.

4. He must at all times enforce the observance of cleanliness and neatness by the employés at his station. He must must see that their conduct is respectful and civil to the public, and that no gratuities are received by them under any circumstances.

5. He must immediately report to his superintendent every instance of neglect of duty on the part of any one under his charge, and in case of complaint being made against any man, he is to communicate the particulars as soon as possible.

6. He is to cause the station grounds to be kept in good order. He must be careful that all stores supplied for the station are prudently and economically used, and that there is no waste of any kind.

7. He will be responsible for all money received at his station for traffic, and will be required to make good any deficiency of cash, whether arising from bad money or errors. He must make up and balance his accounts daily, in the form prescribed by the company, and remit his cash as called for by special instructions.

241 8. An account of the weight of all articles handed to the express company for conveyance must be rendered without exception. No package or parcel for the private use of any employé of this company or for any other person whatever will be allowed to be sent free in baggage car. Any such package must be accompanied by an extra baggage ticket —paid.

9. He must not supply or lend, under any pretence or circumstances, stores or other articles belonging to the company.

10. He shall forthwith communicate to the manager or superintendent all occurrences which may come to his knowledge, bearing upon the interests of the company.

11. The station master must see that the time of arrival and departure of every stopping train, and the time of passing of all other trains or engines, is accurately entered in the train-book.

12. He must report immediately, whenever any train leaves or passes his station, before the time prescribed in the time-table.

13. He must be very particular to inform all conductors of the
242 nature of any orders or arrangements that may exist in any way affecting the trains.

14. Tickets must never be sold for any train to stations at which the train does not stop. Agents must consult the working time-table to avoid the possibility of a mistake.

15. The station master is to direct the conductor of each train when to start, and he must use every exertion to ensure punctuality in the train.

16. No engine or car is to be allowed to cross or shunt on the main line, when a train is expected.

17. No engines or cars are to be left upon the main line, and they must be placed as quickly as possible in a siding, clear of the main line, with the wheels securely scotched.

18. In case of any obstructions on the line, of slips, or other accidents thereon, the agent at the nearest station must give immediate notice by telegraph or otherwise to the superintendent, the engineer, and to the nearest foreman of the permanent way to inform them thereof.

243 *Station baggage-masters.*

1. Station baggage-masters must compare all checks with their duplicates, and see that they correspond before being attached to baggage. They are to wear a badge denoting their office upon their hats or caps.

2. Before baggage is checked, passengers must be requested to show their tickets.

3. All previous station numbers on baggage must be effaced. They must not check baggage until a short time previous to the departure of the train.

4. No checks to be given to cabmen or omnibus drivers (as such), but only to the passengers themselves, and on no account are passengers to be allowed to take checked baggage into the car with them.

5. They must keep no more checks on hand than are actually required, but forward all surplus checks to Montreal. Checks when not in use, must be kept locked up.

6. Special care must be taken not to deliver baggage without first removing the checks and obtaining the duplicates from passengers.

244 Any baggage received, the checks and duplicates of which do not correspond, must be reported, forwarding the checks and stating what station received from, taking a receipt from the owner for the same. When a passenger has lost his duplicate check, a charge of 25 cents must be made, and no baggage must be given up in such cases, unless the person claiming it can describe the content' of each package.

7. Station agents are required to report immediately any baggage wanted at their station, also any baggage that has lain unclaimed twenty-four hours. Baggage having lain unclaimed fourteen days to be forwarded to general baggage agent, Montreal, properly labelled, showing date received, train, &c., &c.

8. No baggage to be opened by agents except in the presence of owner. A weekly report of all checks forwarded and received up to the Saturday night, must be sent not later than the following Tuesday.

9. Excess to be charged in every instance where passengers have more baggage than the quantity allowed.

245 10. A proper supply of forms must be kept on hand.

11. All reports and returns made on the proper forms (others

will be considered irregular), mismatched checks, and inquiries for baggage, to be sent to general baggage agent, Montreal.

12. Requisitions for blank forms must be made to the stationery office, Montreal.

13. Baggage kept for the convenience of passengers under two days, free; from two to seven days, 5 cents; from seven to fourteen days, 10 cents.

*Watchmen at draw-bridges, crossings of other railways, and junctions.*

1. The semaphore signal must always be kept at "danger," and every train or engine must come to a full stop before the "all right" signal can be given or the arm lowered.

246 *Watchmen at level crossings.*

1. Every watchman will be provided with day and night signals, which he must keep in proper order.

2. Watchmen should be constantly on the lookout to prevent by every means in their power, danger or accident of any kind occurring to passengers on the railway, or the public generally. Strangers trespassing on the line must be warned.

*Switchmen.*

1. The duties of men in charge of switches require great care, attention, and watchfulness, for any neglect may cause very serious accidents; the men are, therefore, warned always to be on the alert, and cautious in the discharge of their duty.

2. The switchman is to be careful in keeping his switches clear and well oiled; and whenever a train has passed over, he will see that they
247 are replaced in the proper position. He is also to try his points before the passing through of a train, that he may be thoroughly satisfied there is no impediment to their true working.

3. At those stations where semaphore signals are placed they will be worked by the switchman, who will be responsible for their proper working according to the regulations. The semaphore arm must be raised to "danger" immediately a train arrives at the station, and kept up for ten minutes after it has left. Whenever any shunting is being done at the station, the semaphore must be raised to "danger," and not lowered until the main line is clear, and the switches correctly set. Any defect in these signals to be at once reported.

4. No switchman shall, when a train is due, or within ten minutes of the time, move his switch or allow, on any pretence, any engine to pass from any siding on to the main line without the express order of the station agent, and then he shall not open the switch until the proper danger signal has been shewn.

5. He must carefully examine the switches and stationary signals every time he returns to work after being off duty, and see that they are
248 clean, well oiled, and in condition to work freely. He must report all defects immediately to the agent, who will report to the superintendent and the nearest section foreman.

6. Before leaving their work switchmen must satisfy themselves by per-

sonal inspection that the signals are all right, and switches properly set and locked up for the main line.

7. He must always be furnished when on duty with the following articles:

1 hand lamp, having three colors.
3 flags—red, white, and green.
12 fog signals.

8. The switchman must not allow any engine to pass from one line to another without first ascertaining that it is safe to do so.

NOTE.—When a special written order is given by the superintendent of the district, by telegraph or otherwise, to suspend or alter any of the foregoing regulations, such special order is to be obeyed, on pain of instant dismissal; but in all other cases, the foregoing regulations must be strictly obeyed.

249 RULES AND REGULATIONS.

*Maintenance of ways and structures.—Track repairers.*

1. All in the service must conform to the regulations adopted for the working of the trains, and must give prompt attention to any orders the superintendents may have occasion to issue in connection therewith.

2. Before any foreman or laborer is engaged by the inspector, he must be made to understand that the wilful transgression of any of these rules will be met with immediate dismissal from the service of the company, and that insubordination on the part of any man or foreman, drunkenness whilst on duty, being found off his work during working hours, or the commission or omission of any act whereby the passage of trains or engines is endangered, will be punished by dismissal.

3. In every gang of track laborers there must be a foreman, and
250 the inspector will be held responsible that every foreman is provided with a copy of the regulations, a copy of the working time-table, shewing the running of the trains; and the proper signal flags and lamps, viz: two red and two green lamps, two red and two green flags, and twelve fog signals; also that each foreman is furnished with an accurate gauge for gauging the line of track, and with all other necessary materials and implements.

4. Each foreman shall constantly keep a copy of these regulations while on duty, and must read and explain them to every man engaged under him, and must produce them when required to do so by any of the principal officers of the company. He shall be responsible for the men under his charge, and for the proper execution of the work assigned to him, and shall have a list of the names and place of abode of all men employed under him, so that in case of accident or other emergency, he may be enabled to summon them immediately to assist in any way that may be deemed necessary.

5. Each foreman must walk over his section every morning, and oftener
251 should it be necessary for him to do so, as in the case of violent storms. He must see that all joints are properly spiked and bolted, and the joint ties well packed up, and all other things appertaining to the road secured.

6. Track repairers must be particular in watching each train as it passes,

to see whether any notices are dropped off the train, or flags or lamps are exhibited upon the engine and rear of the train, denoting that an extra train will follow. As special trains are of necessity frequently run, it will be necessary to be prepared at all times for such trains.

7. The signals to be made use of by the track repairers are two, viz: one green and the other red. They will consist of a red or a green flag, to be used by day, and a signal lamp, showing red or green, to be used after sunset. The green signal indicates caution, and is to be used when it is necessary to slacken the speed of an approaching train. The red signal indicates danger, and is to be used when it is necessary to stop the train; and such signals must be sent back eight hundred yards from the place they are meant to protect, and must be waved across the track.

252 8. Whenever it is necessary to displace any part of the track, or in case of any slip or failure of any portion of the works, or in the event of any track or service car being required for temporary use on the line, or if from any other cause the track is not safe, the red signal must be conspicuously exhibited at a distance of not less than eight hundred yards each way, by a man who must be sent expressly to hold each signal, even if no train or engine is expected; and he must continue to exhibit the signal until a messenger arrives with orders from the foreman to withdraw it. No hand-car, or lorry, must be used on the track under any circumstances during a fog or snow storm, or within fifteen minutes of the time of a train being due.

9. When any part of the track is out of repair, so as to make it necessary for a train to proceed cautiously, a man must be sent eight hundred yards with a green signal, in the direction from which a train is expected, and remain there until it passes, or until the track is made safe.

10. The track must not in any case be displaced for the purpose of putting in cattle-guards, cross-drains, or culverts unless by express
253 orders of the engineer or track superintendent, who will appoint some person to be present during such operations, and decide the times between the running of trains, when such work is to be done. The track must not be rendered unsafe by any operation during the day or night or upon Sunday, until notice shall have been given by the engineer to the superintendent, and permission obtained to use the track.

11. No rails must be taken up or the track otherwise disturbed in such a manner as to render it unsafe within twenty minutes of the time of a train being due nor until it has passed. All such work must be done between the regular running hours.

12. In no case, except when there is absolute necessity, is any work to be performed during fog or snow storm, by which an obstruction may be caused to the passage of trains.

13. In raising the track and packing the ballast, no lift must be greater than two inches in a bar of twenty-four feet long, and both rails must be raised equally and at the same time; and in all cases, when practicable, the lift must be made in the direction in which the first train
254 due approaches, so that the train shall run up grade and not down.

14. The inspector has authority to take one or more men, with their tools, from the nearest gang, to assist in any repairs required in the station yards. He must see that the safety blocks are put down on all sid-

ings, diverging from the main track, at the prescribed distance from the main track—not nearer than six feet.

15. No ballast between the rails must be thrown up to a higher level than two inches above the ties; and all gravel or ballast dumped alongside of the track must be shovelled to this side far enough to leave a clear passage for trains, and the rails must be kept clear of gravel and other materials. The track repairers must be particular in maintaining the rails to the proper level gauge and with a good even surface; they must sweep and scrape the rails, when necessary, and keep them free from dirt and snow. All laborers dwelling in shanties along the line are strictly forbidden to keep cows or pigs within the fence. Occupants of crossing watch-houses must be particular in obscuring their windows at night, as the light might be taken for a signal

255 16. The inspector is required daily to see that all bridge and crossing watchmen are at their posts, and that the supply of water and the means for using it are perfect at the bridges in the event of fire.

17. The inspector is held responsible for the safe-keeping of rails, chairs, plates, bolts, tools, and implements of every kind belonging to the company, and all losses and destruction of such property must be immediately reported to the engineer. All tools, implements, signals, and stores of every description when not in use must be kept locked up in a building or in boxes.

18. The inspector must report, in writing, to the engineer every case in which any of the signals are disregarded by the engineman.

19. Any accident befalling an engine or train, or any failure on any part of the works, is to be immediately reported, by special messenger, to the nearest station master on both sides of the spot where the accident has occurred, and he must instantly report the same, by telegraph, to

256 the local superintendent and engineer, and the danger signals must be exhibited at the distance of 800 yards each way.

20. All trees within the railway fences, and all in the immediate proximity of the line, which endanger the same or the telegraph wires by risk of falling, must be cut down.

21. All cattle and animals found straying within the railway fences must be immediately driven off, and each foreman is held responsible for the safe-keeping of the line in this respect in that portion of which he has charge. Any farm gates found open must be promptly closed.

22. All persons walking along the line who are not in the company's service must be peremptorily ordered off, and in case of non-compliance their names ascertained and reported to the track superintendent.

23. All gaps in fences and damages to bridges, cattle-guards, &c., must be repaired in a substantial manner, and the places where such damages exist must be immediately reported to the track superintendent.

24. All level crossings must be closely looked after, particularly to see that the planking is securely spiked down.

257 25. Any temporary injury to the telegraph poles or wires must be repaired as far as practicable, and the damage immediately reported to the nearest station masters. When the wires are touching each other they must be separated.

26. When the lorries, or hand-cars, are not in use they must be lifted off the track, and the wheels secured by a chain. Track lorries must

only be used to convey materials on the line; they must never be attached to a train.

27. All articles found on the track must be promptly sent to the station master of the nearest station.

258 *Instructions for track repairers with regard to the telegraph lines.*

1. The foreman of each gang will be responsible for the good and efficient state of the telegraph lines along the length of road to which he is appointed.

2. The aforesaid foreman shall every day, or whenever inspecting his length of road, carefully observe the telegraphs, and whenever they are broken, in contact with each other, or in any way out of order, he shall immediately repair them.

3. The said foreman shall also, on being notified by the operator in charge of any telegraph station, of a break or interruption on the lines, immediately send some of his gang or go himself to repair it; and should the break or interruption not be found on his division of road, either send out the men of the next division or go on until it is found or the
259 repairers from the opposite direction are met with. For the neglect of this duty, or any part thereof, he will be fined or dismissed.

4. Each gang of men must be provided with the necessary tools and materials for repairing, consisting of one pair of telegraph spurs, one pair of clamps, one pair of pliers, and one file; also a supply of telegraph wire and insulators or caps, to be had on application to the telegraph superintendent.

5. The duty of the repairers in addition to the foregoing will be as follows:

To straighten and brace up all poles that are leaning or in danger of falling.

To replace broken or burnt poles with new ones, which must be cedar and peeled.

To keep the lines from touching trees, branches of trees, or buildings.

To keep asunder the wires, whenever there may be more than one on the same poles, by fastening the top wire tight.

To take charge of all spare telegraph poles scattered along the road.

260 To report to the operator at the nearest telegraph station any repairs that they may make, and the cause, nature, and place of derangement; and,

In the absence of the foreman, to take the necessary steps to repair the telegraph when ordered to do so by an operator in charge of a station.

6. The bridgemen are enjoined to be particularly watchful of the telegraph where it crosses streams, and to use every effort to keep it in proper order. They must also report to the operator at the nearest telegraph station any derangement of the wires or masts of their bridges.

261 *Instructions for repairing.*

1. When the line is broken the wire should be loosened from one or two poles on each side of the break by taking off the tie wire. The two ends of the broken wire should then be screwed in the clamps, drawn to-

gether, and joined by a tight, compact splice. If the wires are too short to come together, a piece of the same size must be put in.

2. After the joint is made, fasten the line up with the tie wire to the insulator on the pole, as it was at first, care being taken to turn the loose ends or points of the tie wire, where wooden insulators are used, downward; but where glass insulators are used, upward, and these ends should be as short as possible. Very little sag should be allowed in the line between the poles.

3. To make a proper joint in the wire hold the two ends lapping each other, in the plyers; and then take five or six short turns with each end round the opposite wire. Samples of such joints can be seen in many parts of the line.

4. When the lines are found to be broken in several places near
262 together, so that it will require much time to repair them properly, the breaks should be hastily united and the lines then hung along the fence or trees, but clear of each other and of the ground, snow, or rails, so that they may be worked while proper repairs are being made, which, however, must be made as quickly as possible.

5. When the wire is off several poles together, but not broken, it should be lifted and kept clear of the ground and the other wires—where there are two or more wires on the pole—while it is being fastened up; communications can be sent over it while the repairs are going on.

6. When insulators or caps are off any of the poles, they must be immediately replaced, and the wire refastened as before.

7. When the line requires repairing at a curve, care must be taken to fasten the wire on the outside of the curve, so that the strain may be against the post, and not from it.

263 *Use of the tools.*

The spurs are used in climbing the poles. They should be strapped on the leg so that the prongs protrude from the hollow of the foot.

The clamps are for the purpose of drawing together the wire when broken, and are used as follows:

Affix one clamp to each of the broken wires by means of the screws, leaving enough of the ends of the wire clear of the clamps, to make a joint of. Then pass the cord, which is attached to one end of the clamps, around the wheel of the other and draw them together. A joint can then easily be made with the slack ends of the wire.

☞Every foreman is required to have a copy of these rules in his possession, under pain of the fine of $1.00 or dismissal.

264 *General rules.*

All special rules, orders, and instructions made and given by the respective superintendents of the company, on their respective districts, and which shall from time to time be made and printed by such respective superintendents on the company's time-bills in use on such districts respectively, and each of them shall be observed and kept by all the employés of the company, and any neglect, refusal, or omission to obey, observe, and keep all and each of the said rules will be punished with the utmost severity the law will permit.

All orders given to employés by telegraph or in writing by the superin-

tendents or their assistants, in the respective districts of the company's railway, must be obeyed promptly and implicitly by those to whom they are addressed. And all employés whose duty it is to see that such orders are communicated to the person or persons to whom they are or may be addressed must see that such orders are promptly delivered to the person or persons so addressed, and understood by them. And all persons
265 so communicating orders, must, to the utmost of their power, see that such orders are obeyed. Any omission or neglect in any of the above respects, by any one concerned, will be punished under the act of Parliament in that behalf.

Passed and adopted at a meeting of the board of directors for the Grand Trunk Railway Company of Canada, held at Montreal, on the fourth day of August, A. D. 1865.

(Signed) J. FERRIER, *Chairman.*

(Signed) JOSEPH HICKSON,
*Secretary and Treasurer.*

Submitted and approved of by governor-general in council, on the twenty-third day of September, 1865.

266 An act passed by the legislature of Canada for punishment of the officers and servants of railway companies (assented to 6th May, 1856).

Preamble. Whereas it in necessary to adopt means for preventing, as far as possible, the great risk and damage to life and property which frequently arise from the non-observance by the officers and servants of railway companies of the by-laws and regulation made for their guidance: Therefore, Her Majesty, by and with the advice and consent of the legislative council and assembly of Canada, enacts as follows:

Punishment of officers or servants contravening by-laws to the injury or danger of persons or property.

1. If any office or servant of, or person employed by any railway company, shall willfully or negligently contravene any by-law or regulation of such company lawfully made and in force, and of which a copy shall have been delivered to him, or shall have been posted up or open to his inspection in some place where his work or his duties, or any of them, are to be performed, then if such contravention shall cause injury to any property or to any person, or shall expose any property or any person to the risk of injury or render such risk greater than it would have been without such contravention, although no actual injury shall occur, such contravention shall be a misdemeanor, and the person convicted thereof shall be liable, in the discretion of the court before whom the conviction shall be had, and according as such court shall consider the offence proved to be more or less grave, or the injury, or risk of injury to person or property to be more or less great, to be punished by fine or imprisonment, or both, so as no such fine shall exceed one hundred pounds nor any such imprisonment the term of five years; and such imprisonment, if for two years or upwards, shall be in the provincial penitentiary.

And if such contravention does not cause such injury or danger.

267 And if such contravention shall not cause injury to any property or person, nor expose any person or property to the risk of injury, nor make such risk greater than it

would have been without such contravention, then the officer, servant, or other person guilty thereof shall thereby incur a penalty not exceeding the amount of thirty days' pay, nor less than fifteen days' pay of the offender from the company, in the discretion of the justice of the peace before whom the conviction shall be had; and such penalty shall be recoverable with costs before any one justice of the peace having jurisdiction where the offence shall have been committed, or where the offender shall be found, on the oath of one credible witness other than the informer; and one moiety of such penalty shall belong to Her Majesty for the public uses of the province, and the other moiety to the informer, unless he be an officer or servant of or person in the employ of the company, in which case he shall be a competent witness, and the whole penalty shall belong to Her Majesty for the uses aforesaid; and the company may, in all cases under this act, pay the amount of the penalty and costs, and recover the same from the offender or deduct it from his salary or pay.

Company may impose penalties for contravention of by-laws.

II. It shall be lawful for any railway company, by any by-law to be hereafter made, to impose upon any officer or servant, or person employed by the company, a forfeiture to the company of not less than thirty days' pay of such officer or servant, for any contravention of such by-law, and to retain any such forfeiture out of the salary or wage of the offender; provided he shall, before such contravention, have had cognizance of such by-law, which may be proved by proving the delivery of a copy thereof to him, or that he signed a copy thereof, or that a copy thereof was posted in some place where his work or his duties, or some of them, were to be performed; and such proof, with proof of the contravention, shall be a full answer and defence for the company in any suit for the recovery from it of the amount so retained, and such forfeiture shall be over and above any penalty under the preceding section.

And deduct the same from offender's pay.

268 UNITED STATES OF AMERICA,
*District of Maine, ss:*

I, A. H. Davis, clerk of the circuit court of the United States for the district of Maine, do hereby certify that the foregoing written and printed pages contain a true and perfect transcript of the record and of all the proceedings in the cause therein named, as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 30th day of October, A. D. 1879.

[SEAL.] A. H. DAVIS, *Clerk.*

269 GRAND TRUNK RAILWAY.

No. 2.

Montreal and Portland district. Private time-table and special rules for the exclusive use and guidance of employés, commencing at 9.10 p. m., Sunday, September 20th, 1874.

Read the rules carefully and note alterations.
Destroy all former time-tables.

270 SPECIAL RULES.

No. 1. The full-faced figures in time-table show where trains are to be crossed or passed, and conductors and engineers by referring to corresponding figures on same line of time-table will see what trains are to be crossed and passed. No train must leave a station where another train of the same class is due, except when instructions in the time-table give right of track, or a crossing order is received in writing or by telegraph from the superintendent through the train dispatcher.

No. 2. Regular passenger trains have right of track over all other trains. Mixed and merchants' express freight trains have right of track over freight trains. Down white signals have right of track over up white signals. When a passenger train overtakes and passes a white-signalled train or engine it in no way interferes with or cancels the rights of the train or engine so signalled, and all special trains going in the opposite direction must so understand it, for the reason that it will not in future be considered necessary to stop express passenger trains to transfer such signals. Conductors will allow five minutes for variation in watches at all crossing stations, but must not run on this allowance.

NOTE.—Mixed, merchants' express freight, and freight trains, when they cannot make their regular crossing or passing stations on time, must keep out of the way of passenger trains; and freight trains must keep out of the way of mixed and merchants' express freight trains, and must be on the sidings before passenger trains are due.

No. 3. When an extra engine or special train is to follow and have right of track over all other trains a red flag by day and a red light by night, in addition to the usual lights, must be shown in front of the engine and in rear of the preceding train, and this red signal will absolutely stop all trains going in the contrary direction until the train or engine for which the red signal was carried has arrived. When a train is to follow not having right of track, but keeping out of the way of all regular trains, a white flag by day, and a white light in addition to the usual lights by night, must be shown in front of the engine and in the rear of the preceding train, and the conductor must notify each station agent, as well as the conductor and driver of all trains, who are to regard the red or white signal, as the case may be, that a train is following, whether by day or night. All special freight trains, running on or following a white signal, must stop at every telegraph station and the conductor must not proceed without first receiving either a telegraph crossing order or a train clearance order from the agent or operator in charge.

No. 4. No empty engine must be allowed to follow a passenger train on

a red signal. An engineman in charge of an empty or special engine has the same responsibilities as the conductor of a special train, and will be governed by the same rules; he must not run at night without having a proper head-light and red tail-lamp exhibited.

No. 5. No train must leave or pass a station or "turn out" before the time named in the time-table. On this point there is to be no discretion.

No. 6. Special trains must be run between stations by the time of trains of the same class in the time-table, and must be shunted at stations at least ten minutes before any regular train is due to pass—and must not pass way stations without the signal to do so has been given by the conductor.

No. 7. As a precaution all conductors before leaving a station shall ascertain from the agent, operator, or person in charge, whether there are any orders or arrangements affecting the running of their trains. To prevent any misunderstanding between the conductor and the agent or operator about the receipt of any special crossing or running order, and as an additional precaution against forgetfulness on the part of either, a blank form "Train clearance order" is always to be filled up and handed to the conductor immediately before the train starts when no special crossing has been arranged, and under no circumstances must the conductor of any train, or driver of a special engine, leave a telegraph station where the train or engine has been stopped without first obtaining either a clearance order or special crossing order properly signed by the operator on duty. After leaving, and while passing a station, conductors are to stand on the platform of the last car to see if any signals are made.

NOTE.—At stations where crossing figures are shown on time-table the telegraph stop signal or flag or lamp must be shown at danger against all trains that are booked to stop, and if such train has orders to proceed further on the conductor must show such order to operator on duty and obtain a clearance order.

No. 8. No construction, wood, or other irregular train must leave a "turn out" in the morning unless sure that all the night trains have passed, and they must be off the main line fifteen minutes before any regular or signalled train is due, and await its arrival, unless duly signalled or specially ordered to the contrary. Any person violating this rule will be prosecuted under the statute with the utmost rigor.

No. 9. Conductors are held responsible for the movements of trains, and must work them strictly in accordance with the rules and regulations. In all cases of doubt or difficulty they are to consult the engine-driver—safety to be the first consideration. Both are required to see that their watches are correct with Montreal and Portland time, and to compare with conductors and drivers of other trains on meeting, also with clocks at stations, and they must report to the assistant superintendent all differences of time.

No. 10. No engine or train is to be allowed to pass a station within ten minutes of another train going in the same direction, and the engine driver must so regulate his speed as to keep that time behind the preceding train.

No. 11. Station agents are held responsible for the safety of the switches, which must always, excepting when a man is standing by, be kept locked for the main line. They must always see that the track is clear at the station, and must not allow cars to be loaded or unloaded on the main line without authority from the superintendent.

NOTE.—This is not intended to relieve conductors and others from the

care of the switches they may use; whoever throws a switch on a side track must see it back on the main line.

No. 12. The alarm bell in the cab of the engine is on no account to be used for starting trains, its purpose being for stopping a train in case of necessity.

No. 13. Enginemen of all trains are to use the whole time allowed for running, excepting that which may be required for doing the work at stations or for crossing other trains. Enginemen must endeavor, as far as possible, to keep up a uniform rate of speed up and down grades. They must have full control over mixed and freight trains when going down grades, and no one mile must be run in less than three minutes. Conductors must see that the train men apply brakes to the cars when going down grades so as to steady the train and keep it under proper control. All trains must pass slowly and cautiously through side tracks, at a speed not exceeding eight miles an hour.

No. 14. During night journeys, or foggy weather, enginemen are to approach all stations with great caution, especially those at which trains should be crossed, keeping a sharp lookout for signals, and having their trains under such control that, if necessary, they can stop before reaching the signals. When passenger and mixed train enginemen do not find freight trains at their proper crossing stations they must look out for them at each station until crossed and have their trains under full control so as to stop short if necessary. When running on a telegraph order they must stop and make sure that they are crossing the specified trains. No verbal communication must be received or delivered by train men or others while trains are in motion.

NOTE.—When approaching public crossings the whistle must be sounded twice. The one short, sharp whistle, so often sounded, alarms passengers and deceives the trainmen.

271 SPECIAL RULES.

No. 15. Station agents must take special care that the track is clear for special trains duly signalled.

No. 16. No special train or empty engine must leave a station unless duly signalled without direct authority from the superintendent or train dispatcher.

No. 17. Conductors, station masters, and others, before acting on any telegraph message ordering the movements of a train, must always intimate to the sender of message the construction which they (the recipients) put upon it and await the intimation that they have understood it properly; and the stoppage of the train having right of track must invariably be secured before the crossing train is dispatched or the track considered to be clear.

NOTE.—Crossing and other orders, referring to the movement of trains, must be handed to the conductor and by him to the enginemen.

No. 18. Agents and switchmen must look out for and carefully observe signals carried by trains passing or stopping at their stations and notify conductors and drivers of other trains running in opposition to these signals.

NOTE.—On receipt of a crossing order, and before replying to it, the

danger signal must be at once exhibited so as to secure the stoppage of the train.

No. 19. To prevent loss of time the conductors are to make their stops at stations as short as possible. No train is to be started from any station until the conductor has given the proper signal for doing so.

No. 20. At stations where semaphore signals are provided agents must be very particular in seeing that the "danger" signals are shown directly a train stops at or passes their station; they are to be kept up for ten minutes after any train has passed or left the station; they must also be exhibted when shunting is going on or the main line is any way obstructed. When a train crossing order is received the semaphore signal is to be raised before the order is replied to so as to ensure the stoppage of the train. The usual danger signal must also be exhibited on the platform. At stations where there are no semaphore signals a red signal must be shown for ten minutes after the passage of any train or engine.

No. 21. Whenever it becomes necessary to back a train to a station it must be done with great care, keeping at least two men with red flags or red lights constantly in advance of the train to warn any train that may be approaching. Neither conductor nor driver has any right to assume that there are no trains approaching.

No. 22. Whenever from any cause a train is delayed between two stations the conductor must send a man each way 800 yards, or 17 telegraph poles, or to the summit of the nearest grade, to warn and advise the approaching train, taking care that he is provided with detonating signals in case the ordinary signals fail. Conductors, brakemen, and switchmen must each carry at least two of the detonating signals about their person when on duty so as to be prepared to use them at any moment. Every precaution must be used to prevent accidents.

No. 23. All free passes must be strictly examined. Trip passes are to be punched and collected with the tickets. Persons travelling without a proper ticket or pass must be charged fare; if they are entitled to a free passage the money will be refunded by the superintendent. Passes are valid only for the persons mentioned in them. Conductors neglecting to enforce this order will subject themselves to dismissal.

No. 24. During the season of navigation all trains and engines must come to a dead stop before crossing the Lachine Canal, whether the bridge is opened or closed, and not proceed until the "all right" is given by the man in charge. When the canal is closed in winter trains are not required to stop at the bridge, but their speed, when passing it, must not exceed eight miles an hour.

No. 25. All trains or engines must pass slowly and cautiously through towns where the track crosses public streets; the bell must be kept ringing until all such crossings have been passed. Speed must not exceed six miles per hour.

No. 26. A red flag by day, or red light by night, waved upon the track, signifies that a train must come to a full stop. The waving of a hat, or any like action, shall be regarded as a signal of danger and not pass unnoticed.

The person giving the signal should be on the engineer's or right-hand side of the engine, unless the train is on a curve.

The signal to start is given by stretching the arm at right angles to the body or by swinging the lamp overhead.

To stop, by stretching both arms at right angles to the body, or by waving anything across the track.

To move cautiously, by moving slowly the right arm down towards the track.

To back up, move the lamp up and down toward the track.

No. 27. Great care should be taken to prevent the killing of cattle upon any portion of the line, and trains running in day time must come to a stop, if necessary, to avoid them.

No. 28. Trackmen may expect trains at any moment, and must always be on the lookout, and prepared for them, whether signal has been carried or not.

No. 29. Trains will not stop at stations or passing places against which in the time-card a * is placed, unless necessary for the proper business of the road to take wood or water or to pass or get out of the way of other trains, but trains must stop at all regular stations where the star is not placed opposite their running time. When two or more trains are running in company on the time of a starred train the train or trains that are following must run into starred stations with extreme caution, with the expectation of finding the leading trains signalled to stop.

☞Should any employé not fully understand the above rules it is his duty to apply to the assistant superintendent for an explanation.

J. HICKSON,
*Secretary-Treasurer.*
W. J. SPICER,
*Superintendent.*

☞Read the rules carefully and note alterations.

272 LOCAL SPECIAL RULES APPLYING TO EASTERN DISTRICT.

All trains must come to a full stop within 500 feet of, and before crossing the track of the Maine Central Railway at Danville and at Yarmouth Junctions, and must not proceed until the all-right signal is shown.

All trains must pass Yarmouth and Snow's Falls at a rate of speed not exceeding six miles per hour.

No engine or train must be run through Commercial street, in Portland, at a rate of speed exceeding six miles per hour. The brakemen must not leave their posts while the train is passing through the street. And whenever a train is backed along the street a man must always be stationed on the rear platform of the last passenger car or on the rear end of the last freight car of every train.

All trains must be prepared to come to a full stop before reaching the semaphore signals at each side of the drawbridge at Back Cove, Portland, and are not to proceed unless the all-right signal is shown by the man in charge of the bridge.

The speed of trains on curve between Grand Trunk main and Lachine lines must not exceed the rate of six miles an hour.

During the season of navigation all trains and engines must stop before crossing the Lachine Canal, whether the bridge is opened or closed, and not proceed until the "all-right" signal is given by the man in charge. When the canal is closed in winter trains are not required to stop at the bridge, but their speed, when passing it, must not exceed eight miles an hour.

No train or engine must be allowed to pass through the Victoria Bridge, in either direction, without a written order from the superintendent or train dispatcher.

No passenger train is to be allowed to pass the Victoria Bridge at a greater rate of speed than fifteen miles an hour; five minutes therefore will be the time occupied in passing the tubes.

Freight trains are not to exceed ten miles an hour, and will occupy eight minutes in passing through the tubes.

On arriving at St. Lambert the conductor will sign a report that his train has arrived and that the bridge is clear, which report must be sent to Point St. Charles immediately.

All up trains and empty engines are to come to a stop at St. Lambert Station, where wheels and trucks are to be examined, and wait for an order from Point St. Charles before crossing the Victoria Bridge.

On arriving at Point St. Charles conductors of all trains and drivers of empty engines must immediately report themselves to the train dispatcher at the telegraph office.

Conductors of all trains, except passenger trains, will ride on the rear car while passing through the Victoria Bridge. Conductors of passenger trains will see that a brakeman rides on the rear car while passing through the Victoria Bridge.

All trains and single engines must come to a stop before passing the semaphore signals, on each side of the draw-bridge over th' river Richelieu, at Beloeil, and are not to proceed without permission from the man in charge of the bridge. Attention is directed to the rule relating to draw-bridges, at page 10, in the book of rules and regulations.

J. HICKSON,
*Secretary-Treasurer.*
W. J. SPICER,
*Superintendent.*

274 UNITED STATES OF AMERICA:

The President of the United States to the honorable judge of the circuit court of the United States for the district of Maine, greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is in the said circuit court before you between Oliver P. Cummings, of Paris, in the State of Maine, and the Grand Trunk Railway Company of Canada, a corporation duly created under the laws of the Dominion of Canada, a manifest error hath happened, to the great damage of the said railway company, as by their complaint appears: We being willing that error if any, hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings afore-
275 said, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within the first thirty days of the term to be holden on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this eighth day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] A. H. DAVIS, *Clerk.*

Allowed.

NATHAN CLIFFORD,
*Associate Justice of the Supreme Court of the United States.*

276 Circuit court of the United States, district of Maine, ss:

And now here the judges of the circuit court of the United States in and for the district of Maine make return of this writ by annexing hereto and sending herewith, under the seal of said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, A. H. Davis, clerk of said circuit court of the United States in and for the district of Maine, have hereto set my hand and the seal of said court this 30th day of October, A. D. 1879.

[SEAL.] A. H. DAVIS, *Clerk.*

(Indorsed:) G. T. R., pl't'ff in error, v. Oliver P. Cummings, def't in error. Writ of error. Maine district, ss. Office clerk C. C. U. S. Rec'd and filed Oct. 8, 1879. Attest: A. H. Davis, clerk.

277 *Copy of bond.*

Know all men by these presents that the Grand Trunk Railway Company of Canada, a corporation duly created under the laws of the Dominion of Canada, as principal, and John Rand and Charles E. Barrett, of Portland, in the State of Maine, as sureties, are holden and stand firmly bound and obliged unto Oliver P. Cummings, of Paris, in the State of Maine, in the sum of twenty thousand dollars, to be paid to the said Cummings, his executors, administrators, or assigns; to the which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the eighth day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

The condition of the above obligation is such that whereas the above bounden Grand Trunk Railway Company of Canada has prosecuted a writ of error to the Supreme Court of the United States to recover the judgment rendered in favor of said Cummings, in a certain suit wherein the said Cummings was plaintiff and the said railway company was defendant, by the circuit court of the United States begun and holden at Portland, within and for the district of Maine, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and seventy-nine:

Now, if the said Grand Trunk Railway Company of Canada shall prosecute its said writ of error to effect, and answer all damage and costs

if it shall fail to make good its plea, then this obligation shall be void; otherwise it shall remain in full force.

GRAND TRUNK RAILWAY COMPANY OF CANADA,
, *Treasurer.* [L. S.]
By JOHN RAND. [L. S.]
CHAS. E. BARRETT. [L. S.]

Signed, sealed, and delivered, in the presence of.

Approved.

NATHAN CLIFFORD,
*Associate Justice of the Supreme Court U. S.*

278 The United States of America to Oliver P. Cummings, of Paris, in the county of Oxford and district of Maine, greeting:

You are hereby cited and admonished to be and appear, on the third Monday of said term, at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Maine, wherein The Grand Trunk Railway Company of Canada is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this eighth day of October, A. D. 1879.

[SEAL.] NATHAN CLIFFORD,
*Associate Justice of the Supreme Court of the United States.*

We hereby acknowledge due, sufficient, and legal service of this citation, and acknowledge service of the writ of error therein mentioned by a copy thereof being this day lodged for the defendant in error in the clerk's office, where the record remains.

Portland, Maine, Oct. 8, 1879.

STROUT & HOLMES,
*Att'ys for Oliver P. Cummings.*

279 UNITED STATES OF AMERICA,
*District of Maine, ss:*

OCTOBER 13, A. D. 1879.

I have this day cited and admonished the within named Oliver P. Cummings to appear at court as within directed, by giving to him in hand a true and attested copy of the within precept.

Fees: Service, 2.00; copy, 1.00; actual travelling expenses, 4.40—$7.40.

AUG. L. SMITH,
*Dep. U. S. Marshal, District of Maine.*

(Indorsed:) G. T. R., pl't'ff in error, v. Oliver P. Cummings, d'f't in error. Citation. U. S. marshal's office, Maine. Received Oct. 10, 1879, o'clock m. Maine district, ss. Office clerk C. C. U. S. Rec'd and filed Oct. 8, 1879. Attest: A. H. Davis, clerk. # 108.

(Indorsement on cover:) No. 138. The Grand Trunk Railway Company, plaintiff in error, vs. Oliver P. Cummings. Maine C. C. U. S. Filed 6th November, 1879.

16-700

# Circuit Court of the United States,

## DISTRICT OF MAINE.

**No. 32, Law Docket.**

OLIVER P. CUMMINGS *v.* THE GRAND TRUNK RAILWAY OF CANADA.

BEFORE CLIFFORD AND FOX, JJ.

## OPINION OF THE COURT.

[SEPTEMBER 21, 1878.]

CLIFFORD, J.

Power to set aside a verdict before judgment, and grant a new trial, is vested in the circuit courts, "in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law," and the proper mode of applying to the court for the exercise of that power is by a motion for new trial in conformity with the rules of the circuit court. 1 Stat. at Large, 83; *Vose* v. *Mayo*, 3 Cliff., 485. Such a motion must be in writing, and must assign the reasons of the application; but where the motion is to set aside the verdict because it is against law or against the evidence or the weight of the evidence, no affidavit of merits is required, as the theory of the motion in such cases is, that all the matters of fact alleged therein are within the knowledge of the presiding justice, or that they may be verified by reference to his minutes taken at the trial. Severe injuries were received by the plaintiff, as he alleges, through collision between the locomotive of the defendants, upon which he was riding in pursuance of his duty as an engineer, and a special engine

and tender which the defendants had improperly, carelessly, and negligently despatched in the opposite direction over the same track, whereby he, the plaintiff, was thrown with great violence from the engine of the train under his charge, and was greatly injured externally and internally, as alleged. Service was made, and the defendants appeared and pleaded the general issue. Subsequently, the parties went to trial before the late circuit judge, and the verdict was in favor of the plaintiff. Pursuant to the rules of the Court, the defendants, after verdict and before judgment, filed a motion to set aside the verdict, and that a new trial may be granted for the reasons following, because the verdict is against law and against the evidence, and the weight of the evidence, which motion was duly filed in the case. Before the motion was heard, the circuit judge, who presided alone in the trial, deceased, leaving full notes of the evidence taken at the trial, and of his charge to the jury. His decease made it necessary for the surviving justice of the circuit, assisted by the district judge, to consider what were the rights of the parties in respect to the verdict, and the pending motion for a new trial, and they came to the following conclusions, which were announced to the parties in court: —

1. That the plaintiff could not have judgment on the verdict during the pendency of the motion, nor until it was waived or overruled.

2. That the right of the defendants to a hearing and decision upon the motion in such a case, is not lost by the decease of the presiding justice.

3. That the plaintiff had a right to insist that the motion should be heard and decided, in order that he might have judgment on the verdict, unless a new trial was granted. *Ins. Co.* v. *Willson*, 8 Pet., 301; *U. S.* v. *Harding*, 1 Wall., Jr., 130; *Doggett* v. *Emerson*, 1 Wood. & M., 5.

Both sides acquiesced in these conclusions, and entered into the following stipulation, and caused the same to be filed and entered of record: It is agreed in this case that the motion for a new trial be heard upon the minutes of Judge SHEPLEY, and such further evidence as both counsel may agree to submit as having been introduced at the trial. Printed copies of the minutes, without additions, were submitted to the Court, and the parties having been since fully heard, the Court will proceed to dispose of the pending motion. Errors of a jury in matters of fact, as well as errors of a judge in matters of law, constitute proper grounds of application for a new trial, the general rule in both cases being, that the application is addressed to the sound discretion of the Court. Duly filed as the motion was in this case, in conformity with the rules of the Court, the application must be examined and decided just as it would have been if it had been heard by the circuit judge who presided at the jury trial; nor is it to be doubted that the whole substance of the evidence is before the Court under the stipulation, as it appears from the inspection of the minutes taken at the trial, that they are apparently full and complete.

Sufficient appears to show that the injuries alleged were sustained by the plaintiff March 6, 1875, near Yarmouth Junction, by a collision which occurred there on the morning of that day between the locomotive of one of the defendants' trains, bound to Portland, and a special engine and tender, also belonging to the defendants, which was bound from Yarmouth to Gorham. Prior to and at the time of the collision, the plaintiff was an engine driver of a passenger train which left Lewiston that morning, and it is conceded that, by the rules of the defendant company, he was entitled to the right of way; that he was entirely free from fault, and that he was running his train in conformity with the rules and regulations of the

company, and that he neither occasioned or contributed to the injury.

Faultless though the plaintiff was, still the evidence shows that the engine of his train, at the time and place mentioned, came in collision with the special engine and tender, before mentioned, in charge of Charles D. Noyes, who left Gorham that morning and came down as far as Yarmouth, where he received orders to leave the train in his charge and to take charge of the said special engine and tender, and to return with the same to Gorham; that in pursuance of those directions the said Noyes took control of the said special engine and tender, in order to return as directed; and it appears that he neglected to obtain either a clearance order or a special crossing order, and that he left the station without any such order, and without right or authority; that he stopped at Yarmouth Junction long enough to allow the signal man to drop the signal, and, through forgetfulness that the train in charge of the plaintiff had the right of way, proceeded towards the next station, and in a few minutes the collision took place which caused the plaintiff the great injuries described in the declaration. By the seventh rule of the company it is provided that no driver of a special engine shall leave a telegraphic station, when the engine has been stopped, without first obtaining either a clearance order or a special crossing order, properly signed by the operator on duty. Beyond all doubt, Noyes had a copy of that rule in his possession, and it is equally clear that he was acquainted with it, and with the time tables regulating the running of the trains, and that he neglected to comply with those rules, the truth being that he forgot that the train in charge of the plaintiff was coming down, and that the other train was entitled to the right of way. Yarmouth was, and Yarmouth Junction was not, a telegraph station, as fully appears in the evidence taken at the trial.

Viewed in the light of these suggestions, it is clear that if the rules of the company in the possession of the driver of the special engine and tender had been observed by him, the collision would not have taken place, and that the injuries received by the plaintiff were caused by the neglect and failure of the engine driver, in charge of the special engine and tender, to comply with and obey those rules and regulations. Authorities of great weight support the theory that the master is not liable to his servant for injuries which were occasioned by the negligence of a fellow servant in the same service. Suffice it to say, without entering into any discussion of that theory, that the circuit judge who presided at the trial fully adopted that view of the law, and that neither party excepted to any of the instructions which he gave to the jury. Among other things, he charged the jury, as appears by his notes, that a workman, or servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is engaged, among which is the negligence of other servants employed in similar services by the same master. On the other hand the master, or employer, impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service. *Priestly* v. *Fowler*, 3 Mees. & Wels., 5; *Vose* v. *Railroad*, 2 K. & N., 714; Wharton Law of Neg. (2d ed.), § 224, *n.* 4.

Had exceptions been duly taken to those instructions, or others given of a like character, it would have been the duty of the Court, as now constituted, to re-examine their correctness, but inasmuch as no exceptions were taken by either party, the Court will confine its attention to the motion filed in the record. Ordinary care in providing machinery and in the selection of servants, it is admitted, is devolved upon an

employer, and the plaintiff contends that the defendants failed to comply with that obligation in several respects: —

1. That the engine driver of the special engine and tender, was incompetent to perform the duties required of such an employé.

2. That it was negligence in the company to despatch the special engine and tender over the road without a conductor, in addition to the engine driver and fireman.

3. That it was negligence in the company to run the special engine and tender over their road, without first establishing a telegraph station at Yarmouth Junction.

1. Much discussion of the first charge of negligence seems to be unnecessary, as the great weight of the evidence is decidedly opposed to the theory assumed by the plaintiff. Propositions in such a case must be tested by the evidence reported, and coming to the evidence it appears that the engine driver of the special engine and tender was twenty-two years of age, that he commenced work with the defendants in February, 1870, as a fireman, that he continued in that position until the twenty-fourth of December, 1874, when he was promoted, and employed as an engine driver. Common experience and knowledge teach that men of that age, in the position of firemen, become more or less acquainted with the duties of an engine driver, both by observation and the occasional performance of the duties of their superior, by his request or permission, and under his supervision. Men thus employed as firemen, study to understand and acquaint themselves with the duties of their superior in employment, and as they become skilled in their immediate employment, they constitute a class who, like the driver of the special engine and tender in this case, are often promoted to the higher employment. For four years the driver of the special engine and tender was employed in the lower position, which, in all probability,

largely qualified him to become an engine driver; and it appears that after he had served that length of time as fireman, he was examined for promotion by the locomotive foreman of the company, as to his qualifications and acquaintance with the rules and regulations of the company for running engines, and was found to be competent in every respect to run an engine from Portland to Island Pond. Pursuant to that report of the locomotive foreman he was promoted and employed as an engine driver, and had been running passenger trains from December 24, 1874, to the time of the collision, without dissatisfaction or difficulty of any kind, nor was the collision caused or in any respect promoted by his want of knowledge, skill or experience in his employment, but from his failure to remember that the train in charge of the plaintiff would come down from Lewiston at that hour, and that it was entitled to the right of way. Evidence to show that his memory was less tenacious than men in general of his class, or that he was accustomed to be forgetful in the discharge of his duties, is entirely wanting; nor does the evidence show any ground to suppose that the defendants could, by any reasonable forecast, have foreseen that any ordinary precaution they could adopt would protect their servants or the public from every degree of forgetfulness; nor is there any evidence to show that the engine driver was incompetent or unskilful as such, or that the defendants failed to exercise due care in his selection and employment in the performance of such duties.

Suppose that is so, and that the person employed was competent to take charge of a passenger train, still the plaintiff contends that he was not competent to be entrusted with a special engine and tender on the morning of the collision, which, as the evidence shows, was a foggy morning. Railroad trains are obliged to run whether the morning is

clear or foggy, nor has the character of the morning anything to do with the question presented by the motion, as it is clear that the fog in no respect whatever occasioned or contributed to the disaster. Instead of that it is plain, from the direct evidence and all the attending circumstances, that it resulted solely from the failure of the engine driver to remember that the train in charge of the plaintiff would come down on the same track, and that the down train was entitled to the right of way. Opposed to that is the suggestion that the faulty engine driver had never before had charge of a special engine and tender, which it seems is true, but it does not seem to the Court that there is any weight in that circumstance, as his four years' experience as fireman, and his later experience as engine driver of a passenger train, must have made him well acquainted with the duties required of engine drivers when in charge of a special engine and tender. Speculative theories of the kind, after the collision, are entitled to little or no weight in a case where it appears that the engine and tender were well managed, and that the engine driver manifested neither want of skill or knowledge in the management of the same, and where it clearly appears that the collision occurred not from any want of skill or knowledge of the engine driver, but from his forgetfulness in failing to get the proper clearance order, or to bear in mind that the down train would be entitled to the right of way.

Different duties, it is said, are required of the engine driver of a special engine and tender, from those required of the engine driver of a passenger train, but the Court is of the opinion that the experience which the engine driver of the special engine and tender had in this case, must have made him entirely familiar with the nature of the duties he was required to perform as the engine driver of such special engine and tender. Abundant evidence is exhibited that he had the

rules for running trains prescribed by the company in his possession, and that all he had to do was to follow and obey their directions. Nothing can be more plainly expressed than are those rules and regulations. Enginemen in charge of an empty or special engine, have, by the fourth rule, the same responsibilities as the conductor of a special train, and will be governed by the same rules. Conductors or the drivers of special trains must not, under any circumstances, "leave a telegraph station, where the train or engine has been stopped, without first obtaining either a clearance order or special crossing order, properly signed by the operator on duty." Even a short experience would be sufficient, as it seems to the Court, to teach a man of ordinary intelligence that he must obey and comply with those rules, and that all must agree that if they had been observed the collision would not have occurred; nor does the Court perceive that any better or more judicious rules could be framed to enable engineers, whether of passenger trains or of special engines and tenders, to understand and perform their duties so as to avoid all mistakes and dangers of collisions. Engineers, however, whether skilled or unskilled, competent or incompetent, may forget some duty which the highest care and forecast of the employer cannot prevent, and in such case the employer, not being an insurer, is not responsible for the consequences in a case like the one before the Court.

**II.** Grant that, and still the plaintiff contends that it was negligence on the part of the defendants to send out a special engine and tender without a conductor, in addition to the engine driver and fireman. Support to that proposition is certainly not derived from the rules of the company, as the fourth rule provides that the engineer "in charge of an empty or special engine, shall have the same responsibilities as the conductor of a special train, and will be governed by the same rules,"

showing that unless the rules of the company are improper, the position of the plaintiff is unsound. Nor is it pretended that the rules of the company were in that respect violated, but the plaintiff at the trial introduced witnesses who expressed the opinion that it was negligence to despatch a special engine and tender without a conductor, in addition to the engine driver and fireman, and there is good reason to suppose that the opinions of those witnesses afforded the jury the principal ground for their verdict in favor of the plaintiff. Whatever may have been the purpose for which the evidence was introduced, it is plain that it was well calculated to mislead the jury, and to divert their attention from the real cause of the collision and injury, which was the forgetfulness, negligence and failure of the engine driver of the special engine and tender, to obey and comply with the rules and regulations of the company. Testimony not objected to must be considered as having been introduced by consent, and inasmuch as no objections or exceptions were taken to the testimony of these witnesses, the question of its admissibility is not presented for re-examination. Conceding that it was properly admissible, still the Court is of the opinion that it is of a slight and inconclusive character, and of very little probative force. Saville, who had been an engine driver for many years, testifies that he remembers only two engines run by him with conductors, and he adds that the conductors in those cases were not placed on the engines for his assistance, but to be carried to other trains for a special purpose. Corser, who, prior to 1865, had been the superintendent of the company, says that in his opinion a conductor is requisite on a special engine; his reasons being that a third man is required to look after the time tables, crossings and signals. Without doubt, an engine driver should be thoroughly acquainted with his time table and crossings. His other directions he receives at the stopping

places, which shows that the reason assigned for a third man on the special engine and tender, consists simply in the theory that the company, notwithstanding they have adopted proper rules for the guidance of the engine driver, and which, if followed, will ensure safety, must also provide a third party to watch and oversee the engine driver, and refresh his recollection. Ordinary care and dilligence are all that the law requires of a carrier, and the Court is of the opinion that, if the carrier exercises due care in the selection of an engine driver, and provides him with all proper rules and directions to enable him to perform his duties in a manner to prevent collisions, and ensure the safety of the public and of all other employés, he, the carrier, cannot be held responsible for the consequences of a collision caused solely by the failure of the engine driver, through forgetfulness, to observe and comply with those rules and regulations. Carriers are not insurers, and consequently are only responsible in such a case for the want of due and ordinary care under the existing rules of decision, as established by the highest authorities. Common carriers of passengers must provide safe and convenient vehicles; and they must not only use due care in the selection of skilled and careful employés to conduct their business, but they must furnish them with suitable rules and directions to guard against accidents and collisions; but they are not bound to provide against injuries resulting from the forgetfulness or negligence of an employé to comply with the rules of the company, furnished him for his guidance in the performance of his duty.

Two other witnesses, Royal and Sawyer, engine drivers, give it as their opinion that three men are required to drive a special engine and tender, but none of the witnesses, except one, state any instances where more than two were furnished, and he gives only a single instance of the kind, when John Young, a conductor, was on the engine with the engine driver and a

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shop. Owners of a factory, workshop, or railroad, are not required in such a case to change their machinery in order to apply every new invention or supposed improvement in appliance, nor are they forbidden to continue to use a machine or apparatus, even though it be shown that it is less safe than another of more modern construction, if it appear that the servant had full knowledge of its character and defects, and that he was not deceived as to the degree of danger that he incurred. *Readhead* v. *Railroad*, Law Rep., 4 Q. B., 393; *Ward* v. *Railroad*, 32 Md., 416; *Riley* v. *Baxendale*, 6 Hurlst. & Nor., 446.

Due care undoubtedly means, having reference to the nature of the contract, a high degree of care, and casts upon the carrier the duty of exercising all practicable vigilance to see that whatever is required for the safe conveyance of his passengers is in fit and proper order. But the duty to take due care, however widely construed, or however vigorously enforced, will not subject the carrier to the public injustice of being compelled by law to make reparation for a disaster for a latent defect in machinery he is obliged to use, which no human skill or care would either have prevented or detected. Nor is an employer liable to his employé for injuries received by the latter from defects which the employer could only have discovered or known by the application of a system of constant guard and inspection incompatible with the nature of the business; nor is a master who does his best to supply skilful and competent persons to perform the service required, liable for damages to an employé resulting from the negligence of another employé in the same service. *Warner* v. *Railroad*, 39 N.Y., 476; *DeGraff* v. *Railroad*, 3 Thompson & Cook, 257. Suitable instruments for the servant with which to do his work, and a suitable place for the servant to work, should be supplied by the master, so that the servant, if he exercises

due care, may perform his work in safety, or subject only to such hazards as are necessarily incident to the business, and for every neglect in that regard the master is liable in case the servant suffers injury, without fault on his part, in consequence of such negligence to fulfil that obligation. Authorities to that effect are numerous and decisive, but it is equally well settled that it is in the power of the servant to dispense with that obligation and waive its fulfilment. When he assents, therefore, to occupy the place prepared for him, and to incur the dangers to which he will there be exposed, having sufficient intelligence and knowledge to enable him to comprehend the same, it is not a question whether the place might with reasonable care and expense have been made more safe. His assent dispenses with the obligation which the master assumed when he employed the servant to remedy those difficulties, and having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected. *Sullivan* v. *India Manuf. Co.*, 113 Mass., 398. Check chains are frequently used in running trains as a proper precaution to hold the cars upon the track, in cases where the train is moving at a high rate of speed. Injuries were received by a road master while in a train of the corporation defendants, which was without check chains. Damages were claimed by the plaintiff for the injuries received upon two grounds:—

1. Because the defendants did not have a proper switch at the time of the accident.

2. Because the cars did not have proper check chains.

Testimony to support the first ground was entirely wanting, and the evidence in respect to the second ground showed that the plaintiff for a long time had been in the employ of the defendant corporation, and that he had been of the opinion that to run trains without that precaution was not safe for

passengers; that he knew that some of the defendants' cars were not provided with check chains, and that he did not notice when he took the car in which he was riding, nor until after the accident, whether it had check chains or not. At the trial the ruling was, that the evidence would not warrant a verdict in favor of the plaintiff, to which he excepted. Hearing was had before the Supreme Judicial Court, and they, GRAY, Ch. J., giving the opinion, overruled the exceptions and rendered judgment for the defendants. They held as follows: That a railroad corporation is not liable to an employé for an injury sustained by him while riding in one of their cars which is thrown from the track, on the ground that the cars were imperfect by the want of check chains, if he was of the opinion that cars without check chains were dangerous, and knew that some of the defendants' cars were not provided with check chains, and did not notice, until after the accident, whether or not the car in which he was riding was provided with such precautionary devices. *Ladd* v. *Railroad*, 119 Mass., 412. No doubt, said COCKBURN, Ch. J., when a servant enters on employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it, or if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, and with knowledge of the facts enters on the service, the master, if the servant had sufficient intelligence to judge of the situation, cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment. *Clark* v. *Holmes*, 7 Hurlst. & Nor., 943; Wharton on Neg. (2d ed.), § 210. Decided cases to the effect that the master is not responsible for injuries happening to his servant from the usual and ordinary risks incident to the employment in which he is engaged, are very

numerous and conclusive. *Conroy* v. *Vulcan Iron Works*, 62 Missouri, 38; *Railroad* v. *Ward*, 61 Illinois, 132; *Patterson* v. *Railroad*, 76 Penn. St., 393; *Railroad* v. *Barber*, 5 Ohio St., 565. Where the servant has equal knowledge with the master that the machinery or materials employed are defective, or that a fellow servant is incompetent, and he remains in the service, he can have no just claim to recover compensation for injuries which resulted from these causes; but if it appears that the master had promised to amend the defect, or to employ a competent person in the place of the one found to be incompetent, the mere fact that the plaintiff continued in the employment of the master will not exonerate the master from liability. *Laning* v. *Railroad*, 49 N. Y., 534. Obvious risks incidental to a business well known to an employé, are assumed by him when he accepts employment where such risks necessarily arise. If a servant enters into an employment knowing there is danger and is satisfied to take the risk, it becomes part of the contract between him and his employer, says WILLES, Justice, in giving the unanimous opinion of the Judges of the Exchequer Chamber, that the servant shall expose himself to such risks as he knows are necessarily incident to the employment. *Saxton* v. *Hawksworth*, 26 Law Times (N.S.), 851.

Apply these rules to the case stated as deduced from the minutes of the judge who presided at the trial, and it is clear that the verdict is against law and against the evidence submitted to the jury. Empty engines, which is the same thing as the special engine, as designated in the rules of the company, were once or twice run by the plaintiff, and he states that he had only a fireman, without a conductor, and that he never ran an empty engine with a conductor; that formerly there was such a custom, but for years past "there has been no conductor"; and he adds that it is not an uncommon thing to send out an empty engine, and there were other witnesses

whose testimony was to the same effect, showing beyond doubt that the usage conformed to the fourth rule, which was in possession of the plaintiff, as well as the engineer in charge of the special engine and tender, and that both had full knowledge of the usage in that regard, which, like the rules of the company, sanctioned the despatching of a special engine and tender in charge of an engine driver and fireman, without a conductor; nor is there any proper ground to question the competency of the engine driver of the special engine and tender, as the fireman who was examined testifies positively to his competency, and states that it was the custom to send out special engines "without only one engine driver and a fireman," and the evidence satisfies the Court that the custom was as well known to the plaintiff as to the defendant corporation. Both rule four and rule seven recognize the custom, and afford strong corroborative evidence that he must have been fully cognizant of the practice, and if so, the established rule of law is, that if he saw fit to continue in the employ of the company, he must be held to have assumed the risk to which he was exposed by that well known practice.

**3.** That it was negligence to despatch the special engine and tender, inasmuch as there was no telegraph station at Yarmouth Junction. Destitute as the proposition is of merit, a few observations will be sufficient to dispose of it. Remarks already made show that there was a telegraph station at Yarmouth, one mile below, and one at North Yarmouth, three miles above, which, in the opinion of the Court, are amply sufficient to enable the defendant corporation to conduct their business with safety to the public and their employés, if the latter will observe and obey the rules of the company in running trains.

Suffice it to say, that the Court, both judges concurring, fail

to find that the defendants omitted in any respect to use due and ordinary care in providing proper apparatus or machinery for the use of their servants in running the special engine and tender, or that they were faulty in any respect in the selection of their servants in charge of the said special engine and tender, or that the plaintiff in view of the whole evidence had any just or legal ground to claim compensation of the defendants for the injuries he received by the said collision. Instead of that the Court feel it to be their duty to say, that unless the evidence presented the claim of the plaintiff in a more favorable light when he first rested than when both parties closed, the Court might well have directed a verdict for the defendants without hearing further evidence.

Motion granted. The verdict is set aside and a new trial ordered.

United States of America
District of Maine —

S. A. H. Davis. clerk of the Circuit court of the United States for said District hereby certify that the foregoing is a true copy of the Opinion, rendered by Clifford J., April T. A. D. 1878. in the Cause therein mentioned:

Witness my hand and the Seal of the said Circuit Court. this Twentieth day of October. in the

16-700

# Circuit Court of the United States.

## MAINE DISTRICT.

No. 17.

OLIVER P. CUMMINGS

*v.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

## OPINION OF THE COURT.

[SEPTEMBER TERM, 1879.]

LOWELL, J.

The Court, consisting of Mr. Justice Clifford and Judge Fox, granted a new trial after a verdict had been rendered for the plaintiff, and, at the conclusion of the opinion then given, it was intimated that a verdict might properly have been ordered for the defendants at the conclusion of the paintiff's case. This opinion, thus authoritative, has induced me to look carefully into the motion which has been made to set aside a second verdict for the plaintiff.

At the close of the evidence of the plaintiff, the defendants moved that a verdict should be ordered for them, which I refused; and their motion for a new trial is, virtually, a review of my action at that time.

The chief reason for my ruling was, that at the former trial the evidence tended to show that the Company had made a sufficient and proper rule, requiring the driver or conductor of a train or of a "wild" engine, to call at each station (or each station where he stopped), to inquire if the track was clear, and to receive any orders that might have been sent for him by telegraph from the train dispatcher at Island Pond. The driver of the engine which came in collision with that on which the plaintiff was riding, had neglected to observe this order, and this was the cause of the collision, which, therefore, resulted from the negligence of the plaintiff's fellow servant.

At this trial there was evidence which tended to show that this rule was very often neglected and disobeyed; so often, that the jury might, perhaps, infer that the corporation ought to have known of the neglect, and therefore might be presumed to have suffered the rule to fall into disuse. This was the new feature of the case, as presented to the second jury. If I was wrong in permitting them to pass upon it, the Supreme Court will correct me upon the exception taken to my action in overruling the demurrer to the evidence. I do not, on reviewing the case, think that I was wrong. I still consider that there was evidence sufficient to warrant the jury to find that the corpora-

tion itself failed in the duty, which, for the purposes of this case, both parties admitted rested upon the corporation, not only to make but also to enforce suitable regulations for the conduct of the trains, etc., with a view to the safety of the public and of their own servants, failing in which they were liable even to a servant of their own.

*Motion for new trial denied.*

United States of America.
District of Maine.

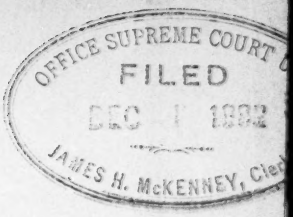
I, A. H. Davis, clerk of the Circuit Court of the United States for said District, hereby certify that the foregoing is a true copy of the Opinion rendered by Lowell J. September 1. A.D. 1879. in the Cause therein mentioned.

Witness my hand and the seal of said Circuit Court this twentieth day of October in the year of our Lord one thousand eight hundred and eighty two

A. H. Davis
clerk

BERRY, PRINTER, PORTLAND.

14-760




# SUPREME COURT OF THE UNITED STATES.

GRAND TRUNK RAILWAY CO., PLF. IN ERROR,

*v.*

OLIVER P. CUMMINGS.

## BRIEF OF PLAINTIFF IN ERROR.

B. Thurston & Co., Printers, Portland, Me.

# SUPREME COURT OF THE UNITED STATES.

GRAND TRUNK RAILWAY CO., PLF. IN ERROR,

*v.*

OLIVER P. CUMMINGS.

## BRIEF OF PLAINTIFF IN ERROR.

Action by employee v. employer, to recover damages for an injury sustained in course of his employment by collision of two trains.

Cummings was an engine driver for the Grand Trunk Co., and his train collided with another train of the same Co. And he claims that the collision and his injuries were by fault of *the corporation.* We say, *not so.* They were caused by negligence and disobedience of his fellow servant.

His writ alleges that it was dft.'s duty *to its servants and employees* to

1st. have *safe and unobstructed tracks:* but did not.

2d. have *proper rules* and regulations for transacting its business, and *enforce them:* but did not.

3d. have *sufficient number* of servants: but did not.

4th. not to employ *incompetent or unsuitable servants:* but did employ such.

5th. to manage its business *carefully:* but did not.

6th. not to permit any train or engine to leave a station without *the proper clearance*, per Rules: but did permit one to leave Yarmouth.

7th. not to allow any trains to *run so as to collide:* but did not safely regulate its trains.

8th. did not have *sufficient telegraph lines, etc.*, for safely running trains.

9th. despatched an engine in charge of *an incompetent driver*, and *without a conductor*,—and *did not notify plf.*

10th. did not provide a *telegraph station at Yarmouth Junction*, and *suitable operators at North Yarmouth, Yarmouth, and Yarmouth Junction.*

Of all these allegations plf. introduces evidence upon 2d and 9th only;—endeavoring to prove the *incompetency of Noyes*—that it was *negligence to send out an empty engine without a conductor or third man*—and that *Co. was negligent in not enforcing its Rule about Clearance orders.*

These allegations are *v. Corporation,—the corp'n did not do.*

The corporation denies all these delinquencies.

Upon these three issues the cause was tried.

Facts of collision are few.

Pltf. an engine-driver on Grand Trunk Railway—left Lewiston 7.20 A.M., with his regular train for Portland—made his usual time and his regular stops at Danville Junction, New Gloucester, and Pownal (as per "*Time Table*" in case)—at Pownal noticed a white flag on Train No. 4 (which plf. train there crossed)—that flag notified plf. that a special was following No. 4, but was to keep out of the way of all regular trains—plf. train left Pownal about on time—did not stop at North Yarmouth—plf. train had right of way.

Charles D. Noyes was also an engine-driver on G. Trunk Railway—he left Gorham, N. H., that same morn. at 4 o'clock with his passenger-train No. 3 for Portland—arrived at Yarmouth at 8.11 A.M.—there he found Engine and Tender 312 (which had left Portland that morning for Gorham), in charge of engine-driver Jackson—per Orders there deliv'd by Jackson to Noyes (see "*Orders*" in case). Noyes left his train and got on to Engine 312, and left Yarmouth for Gorham without any clearance—stopped at Yarmouth Junction (Maine Central crossing) as required by law—then went on about three-quarters of a mile—and collided with plf. train about 8.20 A.M.

Cummings and Noyes were engaged in the same business, on same road, and were, in the strictest sense, *fellow servants*.

Collision and injury to Cummings, caused by negligence and forgetfulness of Noyes,—by his violation of Company's rules. This negligence, forgetfulness, and disobedience, was immediate and proximate cause of collision.

And, if so, well settled that Company is not responsible.

A servant injured by negligence of fellow-servant, without any fault of master, cannot recover against the master.

A servant takes upon himself the ordinary risks and perils incident to the performance of his duties,—and among those perils are those arising from the carelessness and negligence of those in the same employment.

Farwell v. B. & W., 4 Met., 49.
Gilshannon v. S. B. R. R., 10 Cush., 228.
Hayes v. W. R., 3 Cush. 270.
Gilman v. E. R. R., 10 Allen, 233.
Russell v. H. R. R., 17 N. Y., 134.
Chapman v. E. R. R., 55 N. Y., 579.
Lawler v. A. R. R., 62 Maine, 463.
Slater v. Jewett, 85 N. Y., 61.

Duties and liabilities of employer to employee—of a railroad corporation to those in its service—well settled. The Company to use reasonable care,—provide a reasonably safe road and rolling stock,—make reasonable rules and regulations,—not *knowingly* employ incompetent servants,—and provide all reasonable means for doing its business *under its rules and regulations* with reasonable safety.

The Company must use *ordinary care,* and is responsible for its own negligence, but is not responsible for injuries to a servant by negligence of fellow-servant, if it used ordinary care in their selection.

42 N. Hamp. 236-239.
8 Allen, 445.
85 N. Y., 61.

Collision caused by *negligence and disobedience of Rules by Noyes*, a fellow-servant of plf.

Co. established adequate rules for safe running of trains, and of empty engines.

(See Rules on "Time Table" in case—Rule 7.)

And it is very plain that if the Rules had been observed, the collision could not have occurred.

Noyes' negligence and disobedience of Rules was the immediate and proximate cause of collision.

Noyes competent and suitable engine-driver.
Was running passenger trains.
Familiar with Rules and Time Table.
Knew *the Rule*.
Fresh and active—furnished with Orders.

It is not pretended that Noyes was incompetent *as an engine-driver*.

No pretence he did not understand managing his engine—or that incompetency in managing engine caused collision—or that injury would have happened if he had obeyed Rules.

We have the facts of collision, and there can be no question that it was caused by disobedience and negligence of Noyes.

It is a sufficient answer to Cummings' claim that it appears by the testimony he himself introduced, that he and Noyes were fellow servants, and that his injuries were caused by Noyes' negligence.

Cummings attempts to meet (or dodge) these facts and their legal consequences, by charging the collision upon *the corporation itself.* He alleges in writ that *corporation itself did this, and did not do that.*

He alleges (see abstract, ante) *whereby* the plaintiff injured; that the acts of omission and commission of *the Corporation itself* caused plaintiff's injuries—were the proximate cause.

Plaintiff takes burden of proof *to show affirmatively* that injury was caused by some fault of the *Corporation defendant.*

Now did the evidence introduced by plaintiff establish the allegations he undertook to maintain, and answer the requirements of the law? Did he make out a case for submission to jury?

We apprehend not.

First. As to *incompetency of Noyes.* No evidence of it—or of any prior fault.

59 N. Y., 363 (head of page).

He forgot, or disobeyed Rules—and forgot plaintiff train.

A single mistake and forgetfulness.

But such is no evidence of incapacity.

59 N. Y., 363 (bottom of page).

Plf. has not even *attempted* to prove a single act or omission of Noyes indicating incompetency.

> Plf. now says he thinks Noyes incompetent—in what? even plaintiff not question his ability to manage his engine, or his knowledge of Rules.

*Not enough experience!*

> No other witness even *expresses an opinion* that Noyes incompetent; some of them talk about the *experience* required to run an empty engine—and about difference of duties of engine driver of a train, and of an empty engine; but even Corser, so ready a witness for plf., tells us that the only difference is, that the latter determines the time of starting, while former does not.

Burden of plf.'s song is, *inexperience;* but the question is, *competency.*

No evidence of incompetency to run any engine or train.

But even if incompetency had been shown, that would not have made a case sufficient for submission to jury. A pltf. must go further, and show that corporation knew, or ought to have known it. In this plaintiff utterly failed.

A Master is to use reasonable care in selection of servants. Was Noyes competent *at time of his employment by dft.* in skill and ability to manage his engine, and in knowledge of Rules.

The only duty of Corp'n to its employees is to provide reasonable and suitable means to do its ordinary business under its rules and regulations—and to use ordinary care in selection of employees.

If master takes such precautions, employs such servants, and provides such means, as, properly used under the Rules, would ordinarily prevent injuries, he is not bound to provide means to prevent accidents from a breach of Rules by a fellow-servant.

Corp'n bound only to use *ordinary* care; and no evidence of any want of it for any ordinary emergency.

Slater v. Jewett, 85 N. Y., 61.

Second. As to negligence of corporation in sending out an empty engine with *driver and fireman only, and without another man.*

But how does that appear? this is to be considered in connection with the Rules—third man not required by Rules—and Corp'n did not violate any Rule by sending it as it did.

*Under the Rules,* can it be pretended that want of third man caused or contributed to injury? Rules 4 and 7 on Time Table make driver of empty engine a conductor.

But what is testimony on this point? Even pltf. does not testify that it was negligence to run an empty engine with two men only. He testifies he has run empty engines, but does not say that he had a conductor; that it was a common thing on dft. road to run empty engines—that for several years it has been usual to send them without a conductor—*that he knew of such custom before this accident—that he knew Rules as to running them.*

But even if the running empty engines without conductors were shown to be improper and unreasonable, the practice was known to plaintiff—and he continued in service of Corporation—and cannot recover for an injury sustained in consequence of such running.

No evidence of any established custom and practice on any railroad to place a conductor on a special engine to assist the driver in performance of the duties assigned to him by the Rules of the company.

Third. As to alleged negligence of corporation in not having proper rules and regulations for transacting its business, and enforcing them.

An examination of Rules will show that it would be difficult to frame any better adapted to protect both public and servants, if only obeyed.

As to alleged negligence of corporation in not enforcing Clearance Rule (Rule 7).

Plf.'s witnesses do not prove a *general non-observance*. Most of them testify only to a comparatively few instances in which *trains passed a station* without *stopping to get* a clearance.

But Rule only required servants to obtain a clearance at "telegraph stations *where the train or engine has been stopped.*" It did not require them to stop at all stations and obtain a clearance.

There is no evidence that Rule was openly and notoriously violated. But if it was, the plf. must go further, and prove that this was known or ought to have been known to Company, to its officers who make its Rules, and that such officers overlooked it.

O'Neil v. Rail. Co., 45 Iowa, 546.

An examination of testimony upon this point will show how utterly plf. failed to sustain this allegation.

But if such a general disregard of Rule had been shown that a knowledge by corporation would be presumed, then plf. must have known of it, and took the risk.

The only obligation and duty of Corporation was to *use reasonable care* to enforce its Rules.

Clearly there was no evidence of failure to use reasonable care.

See also Ladd v. Railroad Co., 119 Mass., 412.
Zeigler v. Day, 123 Mass, 152.
Snow v. Railroad Co., 8 Allen, 445.
Rose v. Railroad Co., 58 N. Y., 217.

It was incumbent upon Cummings to entitle him to go to the jury, to show affirmatively that his injury was caused by some act or omission of *the corporation*; that *the corporation* was knowingly guilty of negligence in the discharge of its duties and in the transaction of its ordinary business under its Rules, which caused his injury.

It was necessary that he prove affirmatively one at least of the three allegations upon which he offered evidence.

We submit that he failed to do so, and that the Court should have instructed the jury as requested by defendant below.

We apprehend that the instruction given to the jury at pltf.'s request was erroneous.

Stripped of its deceptive verbiage, it says, that if injury was caused by negligence of Noyes (for which dft. Co. not liable), yet if negligence of Co. contributed to produce injury, and plf. was ignorant of such negligence, Company would be liable.

We submit that such is not the law.

The question in this class of cases is what *caused* the injury. If plf.'s own negligence, however slight, even *contributed* to the accident, he cannot recover, however negligent the defendant.

But in cases like this, where plf. is not guilty of any contributory negligence, the real question is what *caused* the accident—what was *the immediate cause*.

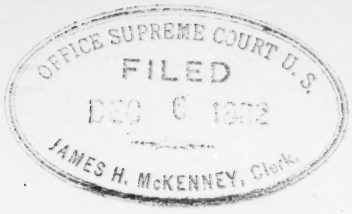
Text writers say that in cases where both fellow-servant and employer are in fault, the inquiry should be, whose fault was the *proximate and immediate cause* of accident. To charge the employer, his negligence must be *the immediate cause* of accident; and if negligence of fellow-servant was the *proximate cause* of the injury, so that but for his negligence accident would not have happened, employer is not liable.

Shearman & Redf. on Negligence, §89.

Upon these principles the instruction given was clearly erroneous.

JOHN RAND,
*for pltf. in error.*

16-760




# SUPREME COURT OF THE UNITED STATES.

## NO. 138.

GRAND TRUNK RAILWAY CO. OF CANADA,
PLAINTIFF IN ERROR,

*vs.*

OLIVER P. CUMMINGS, DEFENDANT IN ERROR.

## BRIEF OF DEFENDANT IN ERROR.

B. Thurston & Co., Printers, Portland, Me.

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GRAND TRUNK RAILWAY CO. OF CANADA,
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*vs.*

OLIVER P. CUMMINGS, DEFENDANT IN ERROR.

*Error from the Circuit Court of the United States for the District of Maine.*

### BRIEF OF DEFENDANT IN ERROR.

The contention in this case is not whether the plaintiff in error is liable for an injury to its servant, caused alone by the negligence of a fellow servant. Whatever may be the final rule adopted by this court upon that subject, its discussion is not required here, because, conceding that the law is as decided by the courts of many of the States, that an employe of a railroad cannot recover for injuries received in the course of his employment, if such injuries were solely caused by the negligence of a fellow servant, and not by the fault and mismanagement of the corporation, the facts of this case are such that the application of such a rule, in its utmost rigor, would not prevent a recovery by the defendant in error.

## STATEMENT OF FACTS.

We claim that the case is as follows:

March 6, 1875, Oliver P. Cummings, of Paris, in the County of Oxford and State of Maine, was an engine driver on the morning passenger train from Lewiston to Portland, and in the employment of the Grand Trunk Railway Company of Canada. The road to Lewiston was a branch road, having its junction with the main line at Lewiston Junction. The Grand Trunk railroad starting from Portland branches at this point, the main line continuing to Montreal and the West, and the branch running to the city of Lewiston. On the main line is the station of North Yarmouth. From this station to Yarmouth Junction (coming toward Portland from Lewiston) is three miles; from Yarmouth Junction to Yarmouth one mile. There was a telegraph station at Yarmouth and North Yarmouth, but none at Yarmouth Junction. There were side tracks at North Yarmouth, Yarmouth Junction and Yarmouth.

Passenger train, No. 3, left Gorham, New Hampshire, each morning and run to Portland, arriving there ten minutes in advance of Cummings' train from Lewiston. On the road from Lewiston to Portland, Cummings was accustomed to meet and cross freight train No. 9, at New Gloucester, and passenger train No. 4, leaving Portland for Lewiston at seven o'clock A.M. These trains were all run by time table, and the times and places of crossing were fixed, except when delayed by some extraordinary cause. With the exception of these trains, under ordinary circumstances, Mr. Cummings had no right or occasion to expect to meet any regular trains on his morning trip from Lewiston to Portland.

In the management of the railroad, with its branches and numerous trains, *not only were definite rules and regulations necessary to be established by the Company*, but THE ENFORCEMENT OF THEIR OBSERVANCE WHEN ESTABLISHED, WAS EQUALLY NECESSARY, not only for the protection of the public but of their own servants, whose lives depended upon the due performance of this imperative duty on the part of their employers.

Accordingly, as the case shows (Record, p. 97), the corporation adopted the following necessary rule for the management of its trains:

"Rule 7. As a precaution to all, conductors before leaving a station shall ascertain from the agent, operator, or person in charge, whether there are any orders or arrangements affecting the running of their trains. To prevent any misunderstanding between the conductor and the agent, or operator about the receipt of any special crossing or running order, and as an additional precaution against forgetfulness on the part of either, a blank form train clearance order is always to be filled up and handed to the conductor immediately before the train starts when no special crossing has been arranged, and under no circumstances must the conductor of any train, or driver of a special engine leave a telegraph station where the train or engine has been stopped, without first obtaining a clearance order or special crossing order properly signed by the operator on duty. After leaving and while passing a station, conductors are to stand on the platform of the last car to see if any signals are made."

"NOTE. At stations where crossing figure on time table, the telegraph stop, signal, or flag, or lamp must be shown at danger against all trains that are booked to stop,

and if such train has orders to proceed further on, the conductor must show such order to operator on duty and obtain a clearance order."

But the case further shows that the Railroad Company negligently allowed this regulation, so vital to the safe management of the trains running upon their road, to fall into disuse, and to be neglected by their employes, so that its observance or non-observance became a matter of convenience on the part of conductors and engineers, running upon the main line of the road. This negligence was *one* of the causes of this disaster. It was beyond the knowledge of Cummings, or his power of control, or remedy.

The court will find this allegation of fault established by the testimony of Stowell (Record, p. 25).

*Ques.* While you were there for the six months, how was the rule in relation to getting clearance orders observed upon that railroad?

*Mr. Rand.* If there is a rule let them put it in; it speaks for itself.

*Mr. Strout.* I produce Rule 7 and put it in.

*Ques.* What was the fact about the observance of that rule on that road for the six months you were on it before this accident? (Objection.)

*Court.* I understand the objection to be that the question should be confined strictly to what this witness knows.

*Ques.* You may answer what the fact was according to your knowledge how it was observed before the accident?

*Ans.* Sometimes they went by telegraph stations without them and sometimes they stopped and got them.

FRED A. MCCANN says, (Record, p. 32):

*Ques.* What was the practice under that rule while you were there?

*Ans.* Sometimes they got them and sometimes they did not.

*Ques.* How frequently should you say they run by without, or did not get them?

*Ans.* So frequently I could not remember.

*Ques.* Was it confined to any special conductor or engineer or train except passenger trains or was it general among the freight?

*Ans.* All trains.

Same witness further proves notice to the Railroad Company of this neglect. (See pages 32 and 33.) The position of all trains when they passed a station or when they started from a station was transmitted to headquarters and the train dispatcher was fully informed of all their movements.

In cross-examination this witness says he knows the morning passenger train (Noyes') was amongst those who neglected to register or get a clearance order.

EDWARD P. PHILBROOK says, (Record, p. 18):

*Ques.* State, prior to 1875, what the observance of that rule was on the part of those in charge of different trains on that road. Was it observed or was it not?

*Ans.* Stop to get clearances?

*Ques.* Yes.

*Ans.* Sometimes they would and sometimes they did not.

*Ques.* What proportion of the times did they not stop at the different stations where the orders were ready?

*Ans.* I think I run by about one-third part of the time.

*Ques.* After this accident or injury, whether or not that rule was enforced?

*Ans.* It was soon after.

*Ques.* Whether or not that matter of running by was general so far as your knowledge, that is going sometimes after them and sometimes not as you have stated?

*Ans.* Yes.

*Ques.* Was there any notice taken by officials of the road so far as your knowledge extends?

*Ans.* I never heard of it.

SAMUEL G. SWEETSIR, (Record, page 53), says in relation to the rule: "I do not think it was generally observed."

CHARLES A. GOWELL, (Record, p. 56), testifies that the rule was not enforced by the officers of the road.

FRANK H. SHACKLEY, (Record, p. 59), testifies that part of the time the rule was observed and a greater part of the time it was not. (Record, p. 61), "*it occurred so often we did not notice it after a while. It got to be a common practice after a while.*"

James Bicknell (Record, p. 64), Fred H. Parsons (Record, p. 69), Nathan Walker (Record, pp. 73, 74), all testify to the same fact of the negligence of the company. Parsons (Record, p. 69) testifies that a book was kept for *signature to receipts for clearance orders*, and that the assistant superintendent came frequently and examined that book, and that information as to each train was transmitted to the central office. He could see whether the rule was broken or kept. The testimony is uniform that no effort was made by the road to enforce this important rule.

It is, therefore, certain that the corporation was in fault in permitting this important and necessary regulation to fall into disuse; that the managers of the corporation were so situated that they must have known, or it was their duty to know, that the rule was not enforced, and that Oliver P. Cummings, employed on this branch road, and running from Lewiston to Portland in the morning and back at night, neither knew, nor was in a position to know, that his life was put in peril by this careless and negligent management. His want of such knowledge was clearly shown by the facts proven, and was found as a fact by the jury, to whose province it properly belonged, to determine such want of knowledge.

In addition to this the testimony shows that whilst regular trains were run by time tables, and were provided with conductors, brakemen and all necessary servants, special or irregular trains were run by *telegraphic orders*. General Train Dispatcher's office for Portland district was at Island Pond. (Record, p. 15.) Locomotive engines were manned and dispatched by Joseph Martin, who was Locomotive Foreman, and had his office in Portland. He

attended to dispatching engines, and hiring and sending out the men upon such engines.

The testimony shows that the running of a wild or special engine requires the most careful and experienced engineers. A special engine must avoid all trains, and the engineer must look out for all obstructions, of crossing teams, track repairers, and other impeding circumstances, beside attending to the wants of the engine, such as the amount of water in the engine, the state of the track, the bell, the whistle, the steam gauge, the machinery, signal and orders. (Record, pp. 15, 40, 41, 45, 67.) Furthermore, the duties of engineer and conductor are entirely and essentially different. It is the duty of the conductor to get clearance orders, crossing orders, to give signal for starting and stopping, look out for signals, note and report all trains to be met or passed, and direct the movements of the train or engine, except so far as the actual running of the locomotive is concerned. For this and other reasons the experience of a man as engineer does not fit him to perform the duties of a conductor, and experience as a conductor does not fit a man to run a locomotive as an engineer. Nor is it prudent management to send out a locomotive or train without both conductor and engineer. But if the engineer undertakes the duties of both conductor and engineer it is clear that he should be a man of age, prudence and experience.

See testimony of Cummings, Record, p. 16; Corser, p. 42; Saville, p. 46; Lunt, p. 67.

The practice of other roads, as detailed by the foregoing witnesses, establishes what is so apparent to all,—that a wild or special train requires a conductor, just as much and more than an ordinary train run by time table.

The case further shows that the morning of the collision, in which Cummings received his injuries, was very foggy, so that another reason existed for greater precaution on the part of the management (Record, p. 31). According to the testimony of Stowell (Record, p. 22), the fireman on the colliding engine, an engine and tender started from Portland to run to Gorham on the main line, as a special train. It was in charge of Andrew Jackson, "an old and experienced engineer." Jackson wanted "to go a gunning" (Record, p. 22). Joseph Martin, the man who had general charge of this part of the business of the Company, ordered Noyes, who was temporarily an engineer, on the down passenger train to exchange trains with Jackson,—Jackson returning to Portland and Noyes going back to Gorham with the special train. (See order, Record, p. 74.) The testimony shows that Noyes was a fireman who was running temporarily for the regular engineer, Walker, who was sick. He had never had sufficient experience to make him competent to run a train with a conductor, and no experience whatever as a conductor. He was less than twenty-one years of age, and the fireman, Stowell, who was with him, was only twenty. (Record, pp. 16, 17, 48.) "I do not think he (Noyes) had had experience required for running a wild engine or special train." (Sweetsir, Record, p. 52, Gowell, Record, pp. 59, 65, 72.) And yet it is in proof without contradiction that on this foggy morning, the person who had charge of managing this part of the business of a great railroad, and stood, in this respect, in place of the Company, took these two unexperienced firemen,—mere boys under twenty-one years,—who had worked since three o'clock in the morning, who were accustomed to disregard the rules of the Company with impunity, and placed

Noyes, a fireman, in charge of this special train, where he would have to perform both duties of engineer and conductor, and turned him back to accommodate one of their men who wished to go a gunning. It cannot be contended that Noyes had knowledge of this negligence, or that it would be likely to occur. He testifies that he had no such knowledge (Record, p. 17).

This was not an ordinary risk or one which Cummings could have foreseen or provided against. He did not contract to risk such extraordinary peril. The jury properly found that such conduct on the part of the road was negligence and the accident resulting therefrom, the Court will not in this stage of the case review their finding.

The testimony further shows that Noyes exchanged engines with Walker, taking the special engine to return to Gorham. He did not stop for a clearance order, as provided by Rule 7, but signaling for the switch, started from Yarmouth. He could not be stopped at Yarmouth Junction because there was no telegraph there. When he started, the operator commenced to telegraph North Yarmouth to stop Cummings' train, but for some reason did not complete the message and the two trains met between North Yarmouth and Yarmouth Junction. Cummings saw the approaching engine, but he did not jump from his train. He reversed his engine, whistled "down brakes," did all he could to save the lives of the passengers and property of the Company, but when he sought to save himself, it was too late. It is needless to detail his injuries here. For twenty days he lay unconscious and for months hovered between life and death.

The action was commenced in the Superior Court for Cumberland county and State of Maine at the May term,

A.D. 1877. At the first term the Grand Trunk Railway Company of Canada, by its Attorneys, Messrs. J. & E. M. Rand, filed a petition to remove the case to the Circuit Court, in which they allege that Oliver P. Cummings was a citizen of the State of Maine, and that the Grand Trunk Railway Company of Canada was a corporation created by the legislature of the Province of Canada, and duly filed the bond and other copies, required by law. The removal was made as prayed for, and at the May term, 1878, there was filed an extended record of the Superior Court, duly authenticated with the findings of the court upon the petition for removal, "that at the time of the commencement of said suit the said Oliver P. Cummings was, and ever since has been, a citizen of the State of Maine, and that the defendant at the time of the commencement of said suit was, and ever since has been, a foreign and alien corporation, and a foreign citizen and subject," etc. (See Record, p. 11.)

After the filing of this additional record the counsel for the Grand Trunk Railway Company of Canada, upon whose petition the cause was removed to the Circuit Court, when the cause was ready for trial and the plaintiff's witnesses were present in court, moved to dismiss for want of jurisdiction. This motion was denied, and the case went to trial upon the general issue, and resulted in a verdict for Cummings for $15,708.33. A motion for a new trial was heard before Judge Shepley, who presided at the trial, but before a decision he died, and the motion was heard by Judges Clifford and Fox, who granted a new trial. The case was again tried before Judge Lowell, and a jury, upon new evidence, much of which was discovered after the first trial, and a verdict was rendered for Cummings for $10,791.00. After the case of defend-

ant in error was put in at the trial before Judge Lowell, a motion was made by the plaintiff in error that the court instruct the jury that upon the foregoing testimony the plaintiff (Cummings) was not entitled to recover, and that the jury return a verdict for the defendant. This motion was fully argued, and the court declined to give the instruction.

The plaintiff in error then proceeded to put in testimony upon all the points covered by the testimony of the defendant in error, and the witnesses were cross-examined. What that testimony was does not appear, but the whole testimony was re-examined by Judge Lowell, and a new trial denied for the reasons found in the opinion, which is printed as a part of this brief.

## POINTS.

I The Circuit Court had jurisdiction of the cause.

1 The removal was valid without the filing of the additional record.

2 The language of the Judiciary Act, upon which is based the decision of this court, that citizenship must exist at the time of the commencement of the action, is, "If a "suit be commenced in a State Court . . . . by a

"citizen of another state." "Clearly this has reference to "the citizenship of the parties when the suit is begun."

Statute 1789, Section 12.
Insurance Co. *v.* Pechner, 95, U. S. 183 (185).

3 Now this is exactly the language of the petition for removal upon which this cause was transferred, and of which a copy was sent to the Circuit Court with the other papers upon the entry of the cause in accordance with the provisions of Revised Statutes, section 639. The citizenship of the defendant corporation plaintiff in error, was not only alleged fully in the petition as of the time of filing that petition, but also as of the time when the suit was begun. (Record, page 10.)

4 In this case the suit is not by a citizen of one state against a citizen of another state, but is against an alien — an entirely different class of actions under all the statutes for removal. Now neither the 12th section of the Judiciary Act nor section 639 of the Revised Statutes, contains, *as to suits against aliens*, any condition that they shall be by citizens of any state — especially do they omit the peculiar language of the statute under which it is held that citizenship must exist when the action is brought.

The Statute of 1789, says: —
"If a suit be commenced in any State Court against an "alien, *or* by a citizen of the state in which the suit is "brought against a citizen of another state."

The language of section 639, is: —
"When the suit is against an alien, *or* is by a citizen of

"the state wherein it is brought and against a citizen of "another state."

If the constitution of the United States limits the jurisdiction of Federal Courts in suits against aliens, to those by citizens of *a* state, it does not, nor does the statute require that such citizenship shall exist at the time the suit is begun, or shall be of any particular state.

5 The additional record, certified in the most complete form, shows that the petition set forth the requisite citizenship, and the other facts necessary to jurisdiction of the Circuit Court. The State Court then had no further power over the cause. Had it undertaken to exercise such power, its action could have been reversed in this court upon error. "The State Court must stop when the peti- "tion and security are entered."

Railroad Co. *v.* Koontz, 104, U. S. 5 (15).

6 This is unlike the case of Insurance Co. *v.* Pechner, cited above, where the proceeding in the State Court did not show a case for removal; and unlike the one supposed in Railroad Co. *v.* Koontz *supra*, where it is suggested (page 16) that should the removing party fail to enter and docket his cause in the Circuit Court, the other may for that reason come in and move to remand it. The removing party, at the second term of the Circuit Court, after the parties were ready for trial, and after abundant proof was furnished (in the "additional record") of the sufficiency of the record of the State Court to afford reasons for it to "proceed no further," moved to remand for an alleged defect in his own proceeding, and not for any act or omission of the plaintiff, or for the actual want of any jurisdictional fact.

II But even if the original papers sent from the State Court had not conferred jurisdiction upon the Circuit Court, the filing of the additional record would have completed the steps necessary therefor.

1 Had there been no entry or docketing before the filing of the additional record, the Circuit Court would then have been authorized to proceed with the cause. It is not necessary in order to perfect the removal that the entry and filing of the papers should be on the day stipulated in the bond.

Removal cases, 100 U. S., 457 (475).

2 Nor at the first term, especially if it is the fault of the other party that they are not so filed, as for instance, where the other party contests the removal in the state tribunals.

Railroad Co. *v.* Koontz, 104 U. S., 5 (17).

3 If the record did not sufficiently show the fact before the filing of the additional record, it was proper to amend it, in order that it might appear. Causes have been even remanded from this court to allow such amendment.

Morgan's Ex'ers *v.* Gay, 19 Wall, 81.
Robertson *v.* Cease, 97 U. S., 646 (650).
Parker *v.* Overman, 18 How, 137 (141).
Deford *v.* Mehaffy, 13 Fed. Rep., 481.

4 If the fact of citizenship appears in any part of the record it is sufficient. Here the record of the Superior Court as finally made up and certified with all the formal-

ities required by the Federal Statutes, shows it in the fullest and most complete manner conceivable.

Briges *v.* Sperry, 95 U. S., 401.
Robertson *v.* Cease, 97 U. S., 646.
Gold Washing and Water Co. *v.* Keyes, 96 U. S., 199.
Bondurant *v.* Watson, 103 U. S., 281.

III The court did not err in refusing the instruction requested by the plaintiff in error, that upon the testimony disclosed by the record the defendant in error was not entitled to recover.

1 The case shows that after the court declined to instruct the jury that the plaintiff was not entitled to recover upon the evidence in the case when the plaintiff rested, "the defendant introduced evidence touching the points covered by the plaintiff's testimony upon which there was cross-examination by the plaintiff." (Record, page 74.)

It will not be denied that by this testimony the plaintiff in error attempted to contradict the testimony offered by the defendant in error—what the cross-examination elicited does not appear — the court cannot say that it did not establish the allegations of negligence in Cummings' writ.

It will be remembered that this motion was made at the close of the testimony offered by the plaintiff in the court below, and not at the close of all the testimony in the case as in the cases hereinafter cited. Had the plaintiff in error contented himself with his law and proceeded no fur-

ther, he might have exception to the refusal of the judge to direct a verdict in his favor; but, if he goes on with his case and puts in new testimony subject to cross-examination it would be absurd to send the case back for a new trial when the very testimony offered by the excepting party would authorize a verdict for the plaintiff in the court below.

The decisions of this court sustain this proposition.

The cases of Oscanyan *v.* Arms Co., 13 Otto, 262; Improvement Company *v.* Munson, 14 Wall, 442; Pleasants *v.* Faut, 22 Wall, 116; and Herbert *v.* Butler, establish the principle, that, if after the testimony is all out, it is insufficient to sustain a verdict, the court will be justified in directing a verdict for the defendant. But the material testimony must be undisputed in order, under the decisions, to warrant the withdrawal of the case from the jury.

Mutual Life Ins. Co. *v.* Snyder, 3 Otto, 393.
Klein *v.* Russell, 19 Wall, 465.
Griggs *v.* Huston, 14 Otto, 554.
JUSTICE HARLAN in Railroad Co. *v.* Fraloff, 10 Otto, 26.

In all these cases the requested instruction that a verdict shall be returned for the defendant, upon the undisputed testimony, is either after the testimony is all in or the motion as in the case of Railroad Co. *v.* Fraloff, *is renewed* at the close of the testimony.

2 The requested instruction that the jury return a verdict for the defendant upon the plaintiff's testimony was equivalent to a demurrer to the testimony, except that

in as much as it was made when the plaintiff rested his case and not when the testimony was all in, it was in effect equivalent to asking for a non-suit.

In the case of Parks *v.* Ross, 11 Howard, 362, this court says, "Hence the practice of granting an instruction like the present which makes it imperative upon the jury to find a verdict for the defendant and which has in many states superseded the ancient practice of a demurrer to the evidence, *it answers the same purpose and should be tested by the same rules.* A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom."

The decision of this point was affirmed in the opinion of JUSTICE MILLER in Pleasants *v.* Faut, 22 Wall, 121; Schuchardt *v.* Allen, 1 Wall, 359.

In Young *v.* Black, 7 Cranch, 568 (2 Curtis, 671), "The court says: A demurrer to evidence is an unusual proceeding, and is allowed or denied by the court in the exercise of a sound discretion under all the circumstances of the case. The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove. It follows that it ought never to be admitted, where the party demurring refuses to admit the facts which the other side attempts to to prove; *and it would be as little justifiable where he offers contradictory evidence or attempts to establish inconsistent propositions.* In the present case the plaintiffs admit that they denied the whole defence of the defendant, and offered evidence to contradict the evidence by which that defence was attempted to be supported. There

would, therefore, have been the most manifest impropriety in acceding to the prayer of the plaintiffs."

See also, United States *v.* Williams, 1 Ware (District Court of Maine), 176.

"Where there is no dispute about facts."

Schuchardts *v.* Allens, 1 Wall., 369.

The motion to direct a verdict for the defendant, which is equivalent to a demurrer, should be addressed *to the whole evidence in the case.* In Merchants Bank *v.* State Bank, 10 Wall., 604, and in all other cases the motion was based upon *all* the testimony in the case. In this case it was not. The defendant had the opportunity of relying upon his motion, or of renewing his motion at the close of the testimony, in which case the record should disclose all the testimony in the case upon which the motion is based. In this case the testimony is not disclosed. The court might have well denied the motion, waiting to see what the defendant would show by his witnesses. It was competent for the defendant to waive his exception and motion. This was done when he determined to introduce his testimony and take his chances to a jury. Suppose some fact should be omitted, which, in the strict construction of the law, would prevent a recovery by the plaintiff, but after a motion like the present the defendant should supply the defect, and upon the whole testimony the plaintiff should be entitled to recover, would it not be a denial of justice to allow the defendant to prevail upon the motion made at the close of the plaintiff's case? No court has ever held this to be the law.

It is the prevailing practice in the State courts never to allow a non-suit *after the defendant has offered any testimony in the cause.* The rule is well stated by Tenney J.,

in Lyon *v.* Sibley, 32 Maine Reports, 576. He says: "It is the right of the judge to order a non-suit after the plaintiff's testimony shall have all been given if he deem it incompetent to maintain the suit. Such a proceeding would of course be subject to the plaintiff's right of excepting. But can a non-suit be entered after the defendant has been allowed to introduce evidence? So far as we know this question is now for the first time presented to the full court for decision. We think in that stage of the case a non-suit cannot be ordered, not even if the judge should consider the plaintiff's evidence insufficient. The plaintiff's case might derive aid from the defendant's testimony. The defendant might put interrogations to a witness which the plaintiff could not. After evidence on both sides the defendant has a right to insist that a verdict be rendered."

Castle & al. v. Bullard, 23 How., 172.

In Emerson *v.* Joy, 34 Maine, 348, CHIEF JUSTICE SHEPLEY says: "A non-suit cannot be ordered without consent after the testimony has been introduced in defence."

The Circuit Court has no right to order a non-suit.

Elmore *v.* Grymes, 1 Peters, 469.

4 We might well stop here if our view of the law is correct. But if this court should decide differently, then we feel sure that the denial of the motion by JUDGE LOWELL was no error, because the plaintiff introduced sufficient evidence, if uncontradicted, to authorize a verdict by the jury in his favor.

It will be remembered that this is not a motion to set aside the verdict as against evidence. The rules to be applied are entirely different.

Schuchardts *v.* Allens, 1 Wallace, 370.

Every fact testified to by the plaintiff is to be taken as true; every inference arising from the facts is to be taken as established, and all the presumptions are also in favor of the plaintiff.

Cases cited *supra.*

5 The act of making up and dispatching the special train was the act of the master. The plaintiff in error was a corporation, and all acts were by the hands of individuals. Martin, having charge of this special department, stood in the place of the corporation.

The rule is laid down with great clearness in case of Ford *v.* Fitchburg Railroad Co., 110 Mass., 260, as follows: "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the

employer may require. In one the master cannot escape the consequence of the agent's negligence; if the servant is injured, in the other he may."

See also Gilman *v.* Eastern Railroad Co., 13 Allen, 433; Arkerson *v.* Dennison, 117 Mass., 410; Railroad Co. *v.* Fort, 17 Wallace, 554.

In Gravelle *v.* M. & St. L. Ry. Co., Fed. Rep., vol. 11, p. 572, JUDGE MCCRARY lays down the rule as follows:

"Fellow servants, within the meaning of the law, are such as are employed in the same service and subject to the same general control. But if a railroad company sees fit to invest one of its servants with control or superior authority over another with respect to any particular part of its business, the two are not, with respect to such business, fellow-servants within the meaning of the law. One is in such a case subordinate to the other, and the superior stands in the place of the corporation. . . . . I think the conclusion I have reached is well supported by reason, by considerations of public policy, and by the following authorities."

Here follow Hough *v.* Railroad; Ross *v.* Chicago, M. & St. P. R. R. Co., 100 U. S., 213; 8 Fed. Rep., 544; Cooly Torts, 550, and other cases.

But we need not go further than the Ford *v.* Fitchburg R. R. Co., cited above since it has been cited and approved in the opinion of JUSTICE HARLAN in Hough *v.* Railroad.

It is clear under these authorities that the act of Martin was the act of the Company.

Testimony of Corser, p. 37.

7 It was grossly negligent to send out this wild engine

in the charge of an inexperienced fireman under twenty-one years of age.

That he was a fireman.

See testimony of Cummings, p. 16.
Edward C. Stowell, p. 22.

"He was a fireman, and so known."

See testimony of Sweetsir, near the top of page 52.
Gowell, p. 57.
Shackley, p. 59.
Bicknell, page 65.
Phelps, p. 72.

His duties as a fireman are detailed by Stowell, page 27, to be, keeping the engine cleaned, firing, ringing bell, and working on engine in engine-house.

He says:

"*Ques.* But your business was to keep it fired up?

"*Ans.* Yes, I had nothing to do with obtaining clear-"ance orders, or with crossings.

"*Ques.* Did your duties as fireman require you to be "acquainted with all the rules of the road?

"*Ans.* No."

The duties of an engineer and conductor are described by

Cummings, p. 16.
Corser, pp. 37, 40, 41, 42.
Saville, p. 45.
Philbrook, p. 49.
Lunt, p. 68.

A fireman's education would fit him to fire the engine, keep it clean, and run it back and forth to the engine-

house. It would no more fit him for an engineer, having to discharge both the duties of engineer and conductor than the experience of a stoker on a steamship would fit him to run the engines and navigate the vessel.

Sweetser testified page 52.

"*Ques.* State in what Noyes was deficient, if you know, "to run a wild engine?

"*Ans. I do not think he had the experience required for "running a wild engine or special train.*"

We are aware that the affirmative testimony on this point was contradicted by the defendant in the trial in the court below, and that it appears of record on page 34.

Cross-examination of Lowell *v.* Walker.

But this only gives emphasis to our position, that there being contradictory testimony the case was one within the province of a jury.

Pickel *v.* Isgrigg & al., 6 Fed. Rep., 676, and cases cited *supra.*

It requires no argument to show that the question of the fitness of the men who were put in charge of the wild engine, for the duties they were called to perform was one of fact for the jury and not for the court. As long as there was controversy concerning it, its withdrawal from the jury would have been manifestly improper.

If it is said that Cummings had knowledge of this unfitness of Noyes for the particular duty he was so unexpectedly called to perform, we answer that his testimony (p. 17) negatives the proposition, and, further, that the statement found in Record, p. 74, that "the defendant did

not contend that the plaintiff was guilty of contributory negligence," precludes the plaintiff in error from contending that any duty was resting upon Cummings that he did not perform, or that he was in fault in the matter.

The jury found under the instruction given by the court, and found on pp. 74 and 75 of the Record, that the plaintiff (Cummings) did not know of the want of ordinary care and prudence on the part of the Company in discharging their duties. In the present stage of the case the court will not revise that finding.

7 The Company was negligent not only in sending out inexperienced men, but in not sending men enough to manage their engine. Lunt testified in cross-examination that three men were necessary.

Record, p. 67.

Corser, an old railroad superintendent, says, Record, p. 45.

"*Ques.* Are not the duties of an engine driver and con-
"ductor distinct and different?
"*Ans.* Yes.

"*Ques.* In running a special train, are not the orders
"and rules addressed to both conductor and engine-driver?
"*Ans.* Yes.

. . . . . .

"*Ques.* You say you consider three necessary?
"*Ans.* Yes."

In this case it was the duty of the engine-driver to watch his steam gauge, watch the track for obstruction,

watch his machinery, and his whole thoughts were engrossed with the running of the complicated machine he had under his hands.

The duties of a conductor were distinct and numerous. He was to look after the various crossings with the numerous trains occupying the road. He should have given the orders for starting and stopping, and regulated the speed of the train. He should have been familiar with all rules and the time tables, and should have ascertained the situation of all trains with which there was a liability of meeting. He should have visited the different stations, obtained all clearance orders, and received for himself *and the engineer* all telegraphic orders and messages, and should have had the oversight and conduct of the whole business. But on this special engine there was no conductor, and the engineer had had no experience either in running a wild engine or in obtaining clearance or other orders. Hence this engine, sent out in this negligent and careless manner, with a management allowing its most important rules to be violated with impunity, came in collision just as it might be expected under the circumstances that it would. The acting engineer never got a clearance order in his life, and if he knew of the rule to do so he knew it as of no binding force upon the employes of this road.

But furthermore, it appears from the rules of the Company that a conductor is necessary.

Rule No. 9 provides, "Conductors are held responsible for the movements of trains, and must work them strictly in accordance with the rules and regulations. In all cases of doubt or difficulty they are to consult the engine-driver. Safety to be the first consideration."

In the note to Rule 17 it is provided that crossing and other orders referring to movement of trains must be handed to the conductor and by him to the engineman.

Rule 19 provides that no train is to be started from any station till the conductor has given the proper signal for doing so.

Now, it is manifest that where an engineer has been in the habit of relying upon the conductor for the performance of all these responsible duties, he in a measure, unfits himself for their discharge, and the more efficiently he discharges his own appropriate and peculiar duties the less he will be likely to attend to the duties peculiar to a conductor. Applying this reasoning to the running of a wild engine, does it not require additional care and experience and the presence of a third person, whose business has led him to the discharge of these functions, to properly run an engine which is to encounter all the extra hazard, which is to be governed in its movements by special telegrams, and which is without the aid of time tables to control its movements? If the engineer discharges his duty in the management of his machine his time and attention are exhausted thereby, and it seems to us to be imprudent in the extreme to throw upon him the exceptional and additional burden of discharging at the same time the separate and distinct duties of conductor. And yet, in the case at bar, this double responsibility was placed upon this youth who had absolutely no experience in the duties of a conductor, and but little practice in the management of an engine itself. We may well understand how the newness of his position should have still further engrossed his attention and rendered him oblivious to all matters outside of those connected with the important duty of manipulating his engine.

8 But if this all fails still there was testimony which justified the jury in finding the Company guilty of negligence in the management of their road.

In the conduct of a railroad it is manifest that rules and regulations are necessary to the safe running of trains.

Conceding the necessity of the rule it follows that it is equally necessary on the part of the master to see to it that it is observed. For of what possible benefit can there be in establishing rules and then allow them to be disregarded. It adds to the dangers of the employment rather than contributes to its safety.

Now it is apparent without argument that Rule 7 was necessary to the safe running of the trains. The testimony clearly shows that it was suffered to fall into disuse on the train line and that the business was so conducted that the management knew or should have known of its neglect and non-observance, and the jury have found that Cummings did not know it as he was not in a position to know it. He was on a branch road and was not bound or expected to be familiar with the defective management of the officers. He had a right to suppose that it would be all that the safety of the public required.

The case was one peculiarly fitted for a jury. The wants and necessities of the railroad, what would be proper rules under the circumstances, the observance or non-observance of those rules, the circumstances attending the collision, the competency of the men employed in running the special train, the number requisite to safely run such a train under the circumstances of this case cannot be decided as questions of law, but of fact. They are

questions about which it is possible minds equally honest might differ. They were issues upon which there was conflicting testimony which it was proper to submit to a jury.

9 Great reliance will be placed upon the opinion of JUSTICE CLIFFORD in the former motion for a new trial, and it will doubtless be freely quoted as the rule for this court to pursue. But, entertaining the highest respect for the opinions of that distinguished jurist, we submit that it is not and should not be conclusive, because he did not sit in the case which he reviewed, and did not have the opportunity of listening to the testimony of the witnesses upon the stand, including Noyes, and because the case at bar differs in the testimony discovered and produced after the first trial, upon which JUDGE LOWELL refused to grant a new trial after the second verdict and after a full hearing. We refer to the opinion of JUDGE LOWELL, herewith printed, as authority for the correctness of the position we have taken.

In the following cases, amongst many others, questions like those involved in this case, either questions of fact or mixed questions of fact and law, were decided to be properly submitted to the jury:

Brown *v.* M. C. R. R. Co., 4 Fed. Rep., 39, 40.
State *v.* Overton, 4 Zab., 435–441.
Morris R. R. Co. *v.* Ayers, 5 Dutch., 393.
Bass *v.* R. R. Co., 36 Wis., 450.
Day *v.* Owen, 5 Mich., 520.

In Gaynor *v.* Old Colony & Newport Railroad Co., 100 Mass., 215, the court say:

"It is agreed in this case that the platforms were not properly constructed, lighted or guarded, and that the de-

fendants were guilty of negligence in backing down the engine without light or signals. The bare statement of these matters shows that it is appropriately the province of the jury to settle them."

The same rule is laid down in Bilbee *v.* London, Brighton and South Coast Railway Co., 18 C. B. (N. S.), 584.

In Shearman and Redfield on Negligence, 3d ed., pp. 12 and 13 and note, the rule is laid down as follows:

"The law imposes duties upon men according to the circumstances in which they are called to act. And though the law defines the duty, the question whether the circumstances exist which impose that duty upon a particular person, is one of fact. In very many cases the law gives no better definition of negligence than the want of such care as men of ordinary prudence would use under similar circumstances. Of course this raises a question of fact as to what men of this character usually do under the same circumstances. This is a point upon which a jury have a right to pass, even though no evidence of the usage were given; for they may properly determine the question by referring to their own experience and information. Consequently a case of this kind must be left to the jury, even if there is no conflict of evidence, unless indeed there is evidence enough to decide this point as well as all other questions in the cause."

In Grand Trunk Railway of Canada, plaintiff in error, *v.* Walker, Fox, J. instructed the jury as follows: "That the defendants, if they undertook to manage and conduct the business of running their trains by telegraph, were bound to have a proper and fit telegraph line for this purpose, with a reasonable number of telegraph stations and operators to properly conduct and control the movements

of the trains. *And it is for the jury to decide whether this duty was performed by the defendants, or whether they were guilty of negligence and want of ordinary care* in this respect by not having the requisite number of telegraph stations and operators for conducting the business of the road. If they were guilty of such negligence and want of care, and thus occasioned the injury which otherwise would not have occurred, then the jury would be authorized to find a verdict for the plaintiff. And this court sustained the ruling upon exceptions.

IV The instruction given by JUDGE LOWELL was not error. It is found on p. 74, and is as follows:

"The court gave to the jury sundry instructions not excepted to, and at the request of plaintiff also instructed the jury that if Noyes was negligent, and if the defendant Company was also wanting in ordinary care and prudence in discharging their duties, and such want of ordinary care contributed to produce the injury, and the plaintiff did not know of such want of ordinary care and prudence, the defendants would be liable; that the mere negligence of Noyes of itself does not exonerate them if one of their own faults contributes."

Cummings did not contract against the combined negligence of a fellow-servant and of his employer, and the presence of negligence in the servant does not excuse the corporation of negligence which contributed to cause the injury.

This proposition is too plain to require argument, and we cite the following cases:

Paulmier *v.* Erie R. R. Co., 5 Vroom (34 N. J., L.), 151–157.

McMahon *v.* Henning, 3 Fed. Rep., 353.
Cone *v.* Del. R. R. Co., 81 N. Y., 206.
Booth *v.* R. R. Co., 73 N. Y., 38.
Crutchfield *v.* Richmond R. R. Co., 76 N. C., 320.
Fifield *v.* Railroad, 42 N. H., 225.
Cayzor *v.* Taylor, 10 Gray, 274.

In the case at bar we respectfully submit that the plaintiff in error is simply attempting to have this court reverse a decision of the jury upon a part of the evidence in the case, when the Circuit Judge has declined to reverse that decision upon the whole testimony after careful examination. Having taken its chances with the jury and sought to again appeal to that tribunal by asking for a new trial, it now says the case should be taken from the jury and decided upon the facts by this court.

It seems to us that the law does not require this second verdict to be disturbed.

STROUT & HOLMES,
*For Defendant in Error.*

# CIRCUIT COURT OF THE UNITED STATES.

MAINE DISTRICT.

No. 17.

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OLIVER P. CUMMINGS

*v.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

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*Opinion of the Court.*

September Term, 1879.

LOWELL, J.

The Court, consisting of Mr. Justice Clifford and Judge Fox, granted a new trial after a verdict had been rendered for the plaintiff, and, at the conclusion of the opinion then given, it was intimated that a verdict might properly have been ordered for the defendants at the conclusion of the plaintiff's case. This opinion, thus authoritative, has induced me to look carefully into the motion which has been made to set aside a second verdict for the plaintiff.

At the close of the evidence of the plaintiff, the defendants moved that a verdict should be ordered for them, which I refused; and their motion for a new trial is, virtually, a review of my action at that time.

The chief reason for my ruling was, that at the former trial the evidence tended to show that the Company had made a sufficient and proper rule, requiring the driver or conductor of a train or of a "wild" engine, to call at each station (or each station where he stopped), to in-

quire if the track was clear, and to receive any orders that might have been sent for him by telegraph from the train dispatcher at Island Pond. The driver of the engine which came in collision with that on which the plaintiff was riding, had neglected to observe this order, and this was the cause of the collision, which, therefore, resulted from the negligence of the plaintiff's fellow-servant.

At this trial there was evidence which tended to show that this rule was very often neglected and disobeyed; so often that the jury might, perhaps, infer that the corporation ought to have known of the neglect, and therefore might be presumed to have suffered the rule to fall into disuse. This was the new feature of the case, as presented to the second jury. If I was wrong in permitting them to pass upon it, the Supreme Court will correct me upon the exception taken to my action in overruling the demurrer to the evidence. I do not, on reviewing the case, think that I was wrong. I still consider that there was evidence sufficient to warrant the jury to find that the corporation itself failed in the duty, which, for the purposes of this case, both parties admitted rested upon the corporation, not only to make, but also to enforce suitable regulations for the conduct of the trains, etc., with a view to the safety of the public and of their own servants, failing in which they were liable even to a servant of their own.

*Motion for new trial denied.*

[A TRUE COPY.]

Attest:

A. H. DAVIS,
*Clerk C. C. U. S.,*
*Maine District.*